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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-484

W. A. BOYLE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner W. A. Boyle prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 16, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is printed as Appendix A to this petiton.

The District Court's opinion and order of February 28, 1972, denying Petitioner's motion to dismiss the indictment, is reported at 338 F. Supp. 1028. The District Court's denial of Petitioner's motion for a

new trial was made orally on June 27, 1972. Both of these District Court rulings are printed as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1973. By order dated August 1, 1973 (Appendix C), the Chief Justice granted Petitioner's application for an extension of time to and including September 14, 1973, within which to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the First Amendment prohibits imposition of criminal penalties upon a union officer solely because he authorized contributions, part of which originated in the union's treasury, to candidates for federal elective office.

2. Whether, where a union treasury contains substantial funds other than involuntary dues and assessments required of members, a conviction under 18 U.S.C. §610 for authorizing union political contributions can be sustained when the Government offered no proof, and the jury was not instructed to find, that the alleged political contributions were from the involuntary sources in the treasury.

3. Whether a union official can be convicted for conversion under 29 U.S.C. § 501(c) solely because he authorized a political contribution that was later held to be in violation of another federal statute (viz., 18 U.S.C. § 610) without regard to either (a) union authorization or ratification of the contribution, (b) benefit to the union from the contribution, or (c) the

official's bona fide belief as to union authorization, ratification and benefit.

4. Whether the Double Jeopardy clause of the Fifth Amendment or a proper application of 18 U.S.C § 371 prohibits simultaneous convictions for both conspiracy and substantive crimes where both convictions are based upon the same course of alleged criminal conduct.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fifth Amendments and the pertinent parts of 18 U.S.C. §§ 371 and 610, and 29 U.S.C. § 501 (c), are printed as Appendix D to this petition.

STATEMENT OF THE CASE

Petitioner W. A. Boyle, at the time an officer of the United Mine Workers of America ("UMW"), was charged under a federal indictment which contained 12 substantive counts and a conspiracy count. Counts 2 through 12 charged Boyle with 11 instances of alleged authorizations of political contributions in connection with federal elections in violation of 18 U.S.C. § 610. Count 13 charged Boyle with "conversion" of union funds in violation of 29 U.S.C. § 501 (c), also in connection with a federal election contribution. The first count was the conspiracy count, charging Boyle and two other individuals (John Owens and James Kmetz) with conspiracy under 18 U.S.C. § 371 to violate the two statutory provisions involved in the 12 substantive counts.

The indictment was returned on October 4, 1971. At that time, there was pending before this Court *Pipefitters* v. *United States* in which certiorari had been granted in May 1971 (402 U.S. 994). Boyle

sought a stay of the proceedings pending a decision by this Court in *Pipefitters,* but the District Court (Richey, J.) refused the stay, and the matter proceeded to trial. The trial took place in March 1972, two months before this Court rendered its decision in *Pipefitters* reversing the decision of the Eighth Circuit (407 U.S. 385).

In addition to seeking a stay pending the *Pipefitters* decision, Boyle also moved to dismiss the indictment. Included among the 40 separately stated grounds urged in support of the motion for dismissal were the following: (1) the prosecution under § 610 would violate the First Amendment guarantees of freedom of speech, association and assembly (ground 32); (2) the indictment failed to allege that any contributions were against the wishes of the union or any union member or that any such contributions were not from a voluntary fund (grounds 14 and 15); (3) count 13 did not allege essential elements of the crime set forth in 29 U.S.C. § 501(c), specifically Boyle's lack of union authority to make the contribution or lack of union consent to it or lack of union benefit from it (ground 28); and (4) simultaneous prosecution under both the conspiracy count and the substantive counts would subject Boyle to multiplicitous prosecution and would violate his Fifth Amendment right not to be placed twice in jeopardy for the same offense (grounds 5, 17 and 22). The trial court denied the motion in all respects (338 F. Supp. 1028). At trial, Boyle moved for a judgment of acquittal both at the close of the Government's case and at the close of all evidence, explicitly reasserting all the grounds relied upon in the motion to dismiss. The trial court denied both motions for acquittal. After the *Pipefitters* decision was rendered by this

Court, Boyle moved for a new trial based upon that decision, and this motion too was denied.[1]

At trial, the Government presented evidence that the political contributions allegedly authorized by Boyle were made by Labor's Non-Partisan League (the "League"), an organization affiliated with the UMW. The Government also presented evidence to show that a substantial part, but not all, of the League's funds came from the UMW treasury. The Government failed to identify the source of approximately $60,000 in the League's treasury, which was over $10,000 more than the total amount of the contributions that were the subject of the indictment.

With respect to the UMW funds allegedly transferred to the League, the Government's evidence showed that a major part (some $90 million) of the funds in the UMW treasury came from sources *other than* involuntary dues, assessments or fees required of UMW members. These sources included anonymous contributions, sales of a book entitled "Coal and Unionism," and sales of various properties, as well as a variety of sources not identified by the Government. This $90 million in funds other than dues and assessments was some 60 times the approximately $1.5 million allegedly transferred to the League by the UMW.

The Government made no effort to show that all or any part of the money transferred from the UMW

[1] The court did not explain its reasons. It simply ruled:

> The court finds that the facts in the case of Pipefitters Local Union No. 502, et al. v. The United States, decided by the Supreme Court of the United States on June 22, 1972, are not the same or similar to those in the case at bar. [J.A. 189.]

to the League came from the dues, assessments and fees in the UMW treasury, rather than these other sources. In fact, neither the Government's opening statement,[2] nor its closing statement,[3] nor the court's instructions to the jury[4] indicated that there was any

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[2] "[I]t is basically necessary in this case for the government to establish for you that these defendants agreed to cause the United Mine Workers of America, a labor organization, to expend its funds by making political contributions to candidates for federal elective office, and we will show that, in fact, these three defendants, together with Robert Howe and Suzanne Richards, did enter into that agreement • • •; in the course of the conspiracy all five will be shown to have participated to some extent in this agreement.

"And we will show further that each one of those substantive counts I mentioned to you did [occur]" (J.A. 59).

[3] "We must establish • • • that a labor organization, and the labor organization we are talking about here is the United Mine Workers of America, made a contribution—that is, transferred money or other things of value—in connection with an election at which Senators or Congressmen or a President were elected" (J.A. 172).

[4] "The essential elements of a violation of Section 610 of Title 18, United States Code, as charged in this indictment are as follows:

"(1) a contribution, (2) by a labor organization, (3) for the purpose of active electioneering, (4) in connection with an election for named federal officers described in the statute, and (5) that an officer of a labor organization willfully consented to this contribution.

• • •

"A requisite element of any violation of Section 610 is that the contribution be made by a labor organization; that is to say, it must be shown beyond a reasonable doubt that the contribution came directly or indirectly from the funds of a labor organization.

• • •

"If you find that the Labor's Non-Partisan League purchased tickets out of funds belonging to the United Mine Workers of America to dinners or receptions and that the purpose of these dinners or receptions was to raise funds for use in connection

legal significance to the sources from which or the methods by which the UMW obtained the funds which allegedly were ultimately contributed to candidates for federal office.

The remainder of the Government's case dealt primarily with showing that Boyle had in fact authorized each of the specific contributions alleged in the eleven § 610 counts of the indictment. The 11 contributions totalled $49,250 made over a 2½ year period, and were for fund raising activities for Presidential as well as Congressional candidates. The sufficiency of the evidence in this respect was hotly disputed at trial but need not be decided by the Court in connection with the issues presented here.

One of the contributions alleged in a §610 count — a $5,000 contribution to the Democratic Congressional Committee — was also the basis for the charged violation of §501(c) for "conversion." The court, in effect, charged the jury that if the $5,000 contribution was unlawful under § 610, Boyle also was guilty of a violation of § 501(c) as a result of its transfer.

Boyle was found guilty on each of the 13 counts, including the conspiracy count even though both of the alleged co-conspirators were acquitted. He was sentenced to serve two concurrent terms of five years in prison and to pay fines and penalties totaling $179,250. A timely appeal was taken to the Court of Appeals, which affirmed the convictions.

(Continued from page 6)

with federal elections and that the cost of tickets exceeded the reasonable value of the food and drink provided, you may find that the excess of the cost over this value was a contribution within the meaning of that term as I have just defined it for you. • • • " (J.A. 177-178).

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS THE IMPORTANT QUESTION OF THE CONSTITUTIONALITY OF 18 U.S.C. § 610 EXPRESSLY RESERVED BY THIS COURT IN ITS JUNE 1972 DECISION IN PIPEFITTERS v. UNITED STATES.

This case squarely presents the question specifically reserved by this Court on at least three occasions: the constitutionality of 18 U.S.C. § 610.[5]

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[5] *United States* v. *CIO*, 335 U.S. 106 (1948); *United States* v. *UAW*, 352 U.S. 567 (1957); *Pipefitters* v. *United States*, 407 U.S. 385 (1972). See also *International Ass'n. of Machinists* v. *Street*, 367 U.S. 740, 773 (1961). Other federal courts have also recognized the constitutional question posed here but have likewise gone to some lengths to dispose of the cases before them in ways which made it unnecessary to reach or resolve the constitutional issue. *E.g.*, *Ash* v. *Cort*, 350 F. Supp. 227, 232 (E.D. Pa. 1972), *aff'd*, 471 F.2d 811 (3d Cir. 1973); *United States* v. *Lewis Food Co.*, 366 F.2d 710, 714 (9th Cir. 1966); *United States* v. *Anchorage Central Labor Council*, 193 F. Supp. 504, 508 (D. Alaska 1961); *United States* v. *Warehouse Workers' Union*, 47 LRRM 2005, 2007 (E.D. Mo. 1960); *United States* v. *Construction & General Laborers Local Union*, 101 F. Supp. 869, 870, 876-877 (W.D. Mo. 1951); *United States* v. *Painters Local Union*, 172 F.2d 854, 856 (2d Cir. 1949). See also *United States* v. *The National Committee for Impeachment*, 469 F.2d 1135, 1141 (2d Cir. 1972).

Section 610 was held unconstitutional in violation of the First Amendment rights of political expression and association in a case involving bank loans to a political candidate. *United States* v. *The First Nat'l Bank of Cincinnati*, 329 F. Supp. 1251 (S.D. Ohio 1971). Although the loans technically came within the statutory language, the court held that, since the loans were fully secured and were made at ordinary bank rates, the statute was unconstitutionally restrictive. This was true even though the court recognized that "rich or influential candidates might obtain fully secured loans more easily than other candidates * * *" (*id.* at 1254).

For further indications of unconstitutionality, see Annotation, 1 L.E. 2d 1918, 1920-21 (1957).

Section 610, as construed by the Court of Appeals decision below, makes it a criminal offense for a union official to authorize any contribution by an organization which has received a substantial part of its funds from the general treasury of the union in connection with a federal election. Petitioner submits that the important constitutional issues raised by § 610 with respect to the scope of legislative power to control federal elections and the limitations on that power imposed by the First Amendment guarantees of freedom of speech and association fully justify the grant of certiorari here.

In *United States* v. *CIO, supra,* the District Court dismissed the indictment on the ground that the statute as applied was unconstitutional. This Court unanimously affirmed that judgment, but the majority did not reach the constitutional question. Four members of the Court concurred in the result but expressly based their concurrence on the unconstitutionality of the statute (335 U.S at 129).

Subsequently, in *United States* v. *UAW, supra,* this Court again postponed the constitutional question, ruling that the challenged conduct was proscribed by § 610 but that the constitutional issues should not be resolved until a full record was developed at trial. Three members of the Court, describing the statute as "a broadside assault on freedom of political expression," dissented from that disposition of the case and took the position that the Court should hold then and there that prosecution of the defendants was constitutionally barred (352 U.S. at 593).

The most recent case in which the constitutionality of § 610 was before the Court was in 1972 in

Pipefitters* v. *United States, supra. **The Eighth Circuit, in a four-to-three *en banc* decision, affirmed the convictions against a variety of challenges, including the constitutional one, and this Court granted certiorari to review that decision. However, again relying on a narrow construction of the statute, the Court found the jury instructions to be erroneous and on that basis reversed, noting:**

> **This disposition makes decision of the constitutional issues premature, and we therefore do not decide them. [407 U.S. at 400.]**

Thus, in each of the three cases in which this Court has previously dealt with § 610 prosecutions, the Court has been cognizant of the serious constitutional questions the statute raises, and the Court has in significant respects narrowly construed the statute with these questions in mind. *A total of five different members of the Court have found the statute to be unconstitutional, and no member of the Court has ever stated the contrary conclusion. We are aware of no reported decision other than the instant one in which convictions of a labor union or its officials have been sustained.* **The crucial question remaining for the future, therefore, is whether § 610, as construed and applied, is constitutional.**

As discussed in the next section of this petition, Petitioner strongly believes that the Court of Appeals decision below is contrary to this Court's decision in *Pipefitters* with respect to the essential elements required for a conviction under § 610. However, if the Court of Appeals correctly concluded that the proof and jury instructions at trial were proper under *Pipefitters* to establish a violation of § 610, the ques-

tion thus presented is whether the Court of Appeals was also correct when it held that the First Amendment permits Congress to prohibit that conduct.

Stated in its simplest form, the Court of Appeals decision flatly prohibits contributions emanating in part from the union's general treasury to advance the campaign of the candidates the union supports for election to federal office. That prohibition, enforced by criminal fines and imprisonment, is applied without regard to whether the contribution is in fact beneficial and necessary to the protection and promotion of the goals of the organized labor movement, the union or its members. It is also applied without regard to whether the union treasury contains funds other than members' dues and assessments from which the contribution can be made, whether the contribution is large or small, whether the contribution is fully disclosed to the public, or whether the union has approved or ratified the contribution.

Further, it is important to note that if a contribution violates § 610, a criminal offense is committed not only by the officer who authorizes the contribution, but also by the union itself and by the candidates or organizations who "accept or receive" the contribution.

This Court has long recognized that the First Amendment guarantees the right of political expression through association as well as through purely individual activities. *E.g., Sweezy* v. *New Hampshire,* 354 U. S. 234, 250 (1957). Thus, the Court has affirmed the rights of various types of associations to promote their goals under the protection of the First Amendment free from legislative abridgments.

NAACP v. *Button*, 371 U.S. 415 (1963); *Hague* v. *CIO*, 307 U.S. 496 (1939). Labor unions, in particular, have been recognized as legitimate associations of working men, not merely for collective bargaining activities, but also as associations for legislative purposes and political expression to protect and advance the interests of the organized labor movement and the "bread-and-butter" concerns of the members. *E.g.*, *Hague* v. *CIO*, *supra*; *Thomas* v. *Collins*, 323 U.S. 516 (1945).

There can be no question that § 610 restricts these rights of free speech and association, and the Government does not really dispute this fact. *See United States v. CIO*, *supra*, 335 U.S. at 127-128. Such a statute does not come before this Court with the usual presumption of constitutionality. *Thomas* v. *Collins*, *supra*. It is constitutional only if it is narrowly drawn to protect a legitimate "compelling interest" of the government *and* results in restrictions on First Amendment freedoms no greater than are essential to the furtherance of that interest.[6] The court below stated its holding on these issues as follows:

> Assuming, only arguendo, that § 610 does restrict in some degree a union's otherwise unlimited right of free speech, appellant has failed to advance a less restrictive alternative to § 610 which will both prevent the use of a union's aggregate wealth in federal elections and protect

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[6] *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). In *Carrington* v. *Rash*, 380 U.S. 89, 93-94 (1965), the prevention of effective, collective political power by the military concentrated in one location was held insufficient to deny military personnel the right to vote at that location.

> union minority interests, and we have found elsewhere no such viable less restrictive alternative. We hold § 610 to be constitutional. [App. A. at 14a.]

Thus, the Court of Appeals decision upholding the constitutionality of § 610 raises the questions whether the two purposes it found for § 610 are proper objectives of legislation and, if they are, whether § 610 is the least restrictive method to achieve these purposes.

Petitioner recognizes that this petition is not the place for a full argument on the merits of the case. However, Petitioner believes that one element of the opinion below is particularly instructive as to the broad implications of the decision and the critical constitutional issues it raises as well as the seriously erroneous rationale it adopts.

Petitioner argued that if § 610 is designed to regulate elections by preventing abuses arising from the potentially corruptive misuse of the large assets available from the collective funds of organizations such as labor unions, the statute was broader and more restrictive of First Amendment rights then necessary for that purpose. Petitioner specifically pointed to the possible alternative approaches represented by legislation requiring full public disclosure of campaign contributions and imposing maximum limits on the amounts of contributions.[7] The Court of Appeals, however, took an expansive view of Congress' legiti-

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[7] This Court has had no trouble in the past devising remedies to protect the rights of employees who object to the expenditure of union funds for political purposes. *See Brotherhood of Railway and Steamship Clerks* v. *Allen*, 373 U.S. 113, 118-124 (1963).

mate objectives and rejected these narrower legislative alternatives because, in the court's words, they would not "prevent the use of a union's aggregate wealth in federal elections" (App. A at 14a).

Perhaps the Court of Appeals had no choice but to adopt the view that Congress can legitimately seek to bar the *use* of "aggregate wealth" rather than merely its *misuse,* for the court had already conceded that the statute bars a $5 contribution as well as a $5 million contribution from the union. It is thus clear that the statute is not concerned with the *amount* of contributions; its concern is with the fact that political contributions are made by a labor union from its resources. Under the First Amendment, this is not a proper object of legislation. To the contrary, it is precisely the type of objective that the First Amendment forbids Congress from seeking to accomplish. A Congressional decree that a labor union as an entity is categorically to be viewed as an "improper" or "undue" influence in the election process solely because it has "aggregate" funds is the antithesis of the First Amendment's guarantee of freedom of political expression through association. *See United States* v. *CIO, supra,* 335 U.S. at 145-146 (Rutledge, J., concurring).

Section 610 as construed by the Court of Appeals is, in effect, such a decree. Petitioner submits that Congress' powers do not extend so far. Whatever the ultimate decision of this Court may be, however, the issue is one of such importance as to justify this Court's consideration and decision. If Congress may properly seek to bar the use of associations' aggregate resources in federal elections, that power is obviously

of direct concern to unions and their members as well as to all other types of associations, including every company in the United States. Congress' power to regulate our political processes through controls over election financing is, indeed, of profound and immediate concern to all citizens.

The question as to Congress' power to restrict the political expression of a union under the guise of protecting minority members in the union also presents serious constitutional problems, both with respect to the legitimacy of that objective and the application of that objective by § 610. The threshold question presented in this regard is whether the statute is overly broad in prohibiting contributions where the record shows substantial funds in the union treasury from other than involuntary sources, and the Government makes no effort to show that the contributions in fact came from the dues and assessments. In addition, if this Court were to adopt the view that any contribution from the general treasury is properly presumed to include monies from the involuntary sources in the treasury, then the Court would need to reach the further question whether § 610 as applied to prohibit contributions from such involuntary sources is constitutional. In effect, the statute under these circumstances insists upon "atomized individual rule and action in matters of political advocacy." *United States* v. *CIO, supra,* 335 U.S. at 147. Such a radical departure from the normal principle of majority rule in collective associations with its attendant restraint on political association and expression further justifies the review by this Court of the decision below.

II.

THE DECISION BELOW INVOLVES IMPORTANT QUESTIONS OF THE CONSTRUCTION OF TWO FEDERAL STATUTES REGULATING CAMPAIGN CONTRIBUTIONS AND UNION OFFICERS' ACTIVITIES.

A. The Court of Appeals' Construction of 18 U.S.C. § 610 Is Contrary To This Court's Decision in Pipefitters.

This Court in *Pipefitters* held that union political contributions violated § 610 "if, *and only if,* payments to the fund were actually or effectively required for employment or union membership" (407 U.S. at 439; emphasis added). Because the jury instructions failed to require either proof or a finding as to this "essential element for conviction" (*id.* at 436), the convictions were reversed. The Court thus explained:

> * * * [T]he essence of the crime in this respect is whether the method of solicitation for the fund was calculated to result in knowing free-choice donations. Whether the fund was otherwise controlled by the Union is immaterial. [*Id.* at 439.]

The Court of Appeals in this case, however, held that the requirement of proof of the involuntariness of the source of contributions was not a necessary element of the Government's case against Petitioner under § 610 and did not even have to be submitted to the jury. Rather, the court affirmed Petitioner's conviction on the basis of its conclusion that the violation consists of only the following elements:

> The Government must prove beyond a reasonable doubt that (1) a labor organization (2) made a contribution or expenditure (3) in connection with a specified federal election (4) for purposes of active electioneering and that (5) the defendant officer consented to the making of the contribution. [App. A at 6a.]

This statement of the necessary elements under § 610 is almost identical to the charge given the jury.[8]

In explaining this statement, the Court of Appeals expressly rejected Petitioner's contention that proof of involuntary sources was an additional essential element of a violation.[9] The court justified its apparent departure from *Pipefitters* by taking the position that *Pipefitters* requires a showing of the involuntariness of the sources of political contributions only in cases involving a "separate fund". Where the contributions were from the union treasury, the court ruled, nothing further need be shown as to the involuntariness of the

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[8] The relevant portions of the charge are set forth in the Statement of the Case, *supra*, n.4. It is clear that under this charge the jury could have convicted solely because it thought Petitioner "consented" to a contribution by a "labor organization" for the purpose of active electioneering in connection with a federal election, even though this Court plainly held in *Pipefitters:*

> Nowhere * * * has Congress required that the political organization [which makes the political contribution] be formally or functionally independent of union control or that union officials be barred from soliciting contributions or even precluded from determining how the monies raised will be spent. [407 U.S. at 415.]

Moreover, the Court in *Pipefitters* stated that hereafter a proper jury charge under § 610 could "be framed in terms of the application to the proof of the language of § 205 of the Federal Election Campaign Act" (407 U.S. at 441 n.51), which the Court said "plainly permits union officials to establish, administer, and solicit contributions for a political fund" (*id.* at 421).

[9] The Court of Appeals misconceived Petitioner's position when it said Petitioner wanted the Government to "show in all circumstances that the contributions *could not* have come from a 'voluntary' source" (App. A. at 9a). Petitioner's position is rather that the Government carries the burden of showing that the illegal contributions in fact came from an involuntary source. That is how the statute was interpreted in *Pipefittters.*

contribution (Opinion at 9-10). To support this conclusion, the court stated:

> Congress in prohibiting expenditures from a union general treasury simply acted on the principle that expenditures from commingled funds *will be presumed* to consist of proportionate shares of the different types of money. [App. A at 9a n.16; emphasis added.]

In thus speaking in terms of what "will be presumed" under § 610, the court, of course, is really stating that under the statute it makes no difference to what extent sources other than dues are contained in the treasury or whether, in fact, non-dues monies are actually used to make the contributions. *As a matter of law,* any contribution originating from the union treasury is automatically deemed to include members' involuntary dues and assessments and, therefore, is prohibited. That approach is directly contrary to the one taken by other lower courts in interpreting § 610.[10]

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[10] For example, in *United States* v. *Seafarers Intern'l Union,* 343 F. Supp. 779 (E.D. N.Y. 1972), the indictment was dismissed as to all union defendants in part because the Government had not fully complied with court orders to supply the defendants in advance of trial with precisely which part of a political fund the Government thought was made up of involuntary dues and assessments and which part was from other sources. The court noted, significantly: "Especially *since the Government's case must succeed or fail with its ability to show the involuntariness of contributions to SPAD* [the political fund] and considering the minimum lapse of four years between the time of contribution to SPAD and the time of trial, the defendants' need for specification of circumstances is almost self-evident" (*id.* at 783 n.6; emphasis added). It is difficult to understand why the Government must show the involuntary portion of a fund in advance of trial if, as the Court of Appeals ruled here, mingled voluntary and involuntary sources relieve the Government of any burden to prove an involuntary portion at the trial itself.

In *United States* v. *Anchorage Central Labor Council, supra* n.5, the court granted a motion for acquittal in part because "some,

Moreover, the Court of Appeals' refusal to circumscribe the reach of § 610 by making the question of involuntariness an indispensable element of the crime is precisely the refusal that this Court struck down in *Pipefitters*. Both the trial court and the Court of Appeals in *Pipefitters* felt that the ultimate question under § 610 was whether the money contributed was "union money." Thus, the trial court's instructions called for a guilty verdict if the fund from which contributions were made "was in fact a union fund, * * * the money therein was union money, and * * * the real contributor to the candidates was the union" (quoted at 407 U.S. at 441).[11] The Eighth Circuit's affirmance was similarly based upon its acceptance of the Government's claim that the ultimate question is whether

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at least, of the unions had sources of income other than dues, as for example *rental of property* owned by the union or *interest on savings accounts or bonds*" and "these funds were commingled into one general fund, such that it would be impossible to say whether the TV contributions and the per capita tax were paid out of dues or other income" (193 F. Supp. at 507; emphasis added). In other words, the fact that there were commingled voluntary and involuntary funds justified an order of acquittal in that case, whereas the Court of Appeals here is saying that the question of source should not even have been submitted to the jury.

Again, in *United States* v. *Warehouse Workers' Union*, *supra* n.5, the court entered a judgment of acquittal as to all union defendants in a § 610 case, ruling in part:

> * * * there has been no evidence adduced by the Government that the allocations by roughly two-thirds of the individual members of Local 688—a defendant here—were not entirely voluntary—*even though they may have been allocations from the general dues* paid by such individuals as Union members. [47 LRRM at 2006, 2007; emphasis added.]

[11] The Government had plainly stated in opposition to a motion to dismiss: "The issue is whether these funds were the general funds of Local 562" (quoted at 407 U.S. at 437).

"the money in the fund is in truth and in fact money belonging to Local 562" and that the issue of voluntariness while "relevant is not controlling" (434 F.2d at 1120). The opinion of the Court of Appeals in the instant case, adopting the view that "the proper issue" is whether the "source of the funds transferred * * * was the UMW treasury" (App. A at 11a), reflects the same misconstruction of the reach of § 610.

It is crucial to note that this is *not* a question of the sufficiency of the evidence presented by the Government to support a jury's finding of involuntariness. Rather, the question is the fundamental one of what are the essential elements of the crime as to which the jury must be instructed. The Government's evidence showed that some (but not by any means all [12]) of the funds in the League's treasury came from the general treasury of the UMW. But the evidence also showed that a large part of the UMW's general treasury (in excess of $90 million) consisted of monies other than the dues and assessments required to be paid by union members. The jury was not instructed that it had to find that the involuntary sources were used for the contributions in order to render a verdict of guilty. Indeed, the words "voluntary," "involuntary," "compulsory," or "required" nowhere appear in the jury instructions. The Court of Appeals simply took away from the jury its most important function: fact-finding. The court itself repeatedly made the factual determinations which should have been left to the

[12] The "relatively small portion" of the League's funds which the Court of Appeals admitted the Government could not account for (App. A at 4a n.5) was actually substantially in excess of the total amount which allegedly was illegally contributed (see Statement of the Case, *supra* at 5-7).

jury.[13] The question, thus, is whether under *Pipefitters* a conviction can be sustained only where the Government has proved and the jury has been properly instructed to find that the source of campaign contributions was members' compulsory dues or assessments "actually or effectively required for employment or union membership."

The trial below took place before the *Pipefitters* decision was rendered and it is, therefore, understandable that the Government proceeded upon the same view of § 610 it had successfully espoused before the trial court and the Eighth Circuit in *Pipefitters*. How-

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[13] *E.g.*, "In Boyle's case, though, contributions were made from funds derived from the general UMW treasury, which was composed predominantly of dues, assessments and other 'involuntary' funds" (App. A at 8a); "A substantial, or huge, portion of the money in the League treasury was 'involuntary' at the time of the contribution. The 'involuntary' portion may be presumed to be a part of each expenditure from the commingled funds" (*id.* at 9a n.16); "the undisputed evidence establishes the involuntary nature of the members' contributions to the UMW general treasury • • • (*id.* at 11a).

This approach should be compared with that in *United States* v. *Lewis Food Co.*, 236 F. Supp. 849 (S.D. Cal. 1964), *remanded*, 381 U.S. 908 (1965), *rev'd*, 366 F.2d 710 (9th Cir. 1966). The District Court dismissed a complaint charging a violation of § 610 in part because the complaint failed to charge that the expended funds came from the general corporate treasury. In the Court of Appeals, the Government conceded that "a crucial consideration is whether the corporation's general funds were employed in financing the advertisement" (366 F.2d at 713), as opposed to "some independent fund contributed by shareholders or otherwise obtained" (*ibid.*). However, the Government argued—and the Court of Appeals agreed—that the source of the funds was "a question of fact to be resolved by a jury". The complaint did not have to allege the source because "[e]ntry of the plea of not guilty" in and of itself "gave rise to a question of fact as to the source of the corporate funds" (*ibid.*).

ever, the trial court's refusal to grant a new trial after the decision in *Pipefitters*, and the Court of Appeals' decision upholding that conviction, have resulted in a construction of § 610 so fundamentally at odds with the principles established in *Pipefitters* that it will, if permitted to stand, seriously erode the effect of *Pipefitters* and re-create the uncertainty as to the reach of § 610 that *Pipefitters* sought to eliminate.

In sum, Petitioner submits that review of this case is necessary to clarify the reach of § 610 as a limitation on the permissible political activities of labor unions and to prevent serious departure by the Court of Appeals from the principles enunciated by this Court in *Pipefitters*.

B. The Court of Appeals' Construction of 29 U.S.C. § 501(c) Is Improper and in Conflict With That of the Second Circuit.

Count 13 of the indictment charged that Petitioner "did unlawfully and willfully convert to the use of others" $5,000 that was contributed to the Democratic Congressional Committee. This same contribution was charged in an earlier count in the indictment as being one of the contributions made in violation of § 610. The Government claimed, and the court instructed the jury, that if the contribution was "unlawful" in the sense of being in violation of § 610, Petitioner's authorization of the transfer was a "conversion" illegal under 29 U.S.C. § 501(c).

Most importantly, the trial court instructed the jury that if the contribution was improper under § 610, Petitioner violated § 501(c) even if the evidence showed and the jury found that (1) the contribution was approved and ratified by UMW's Executive Board and (2) the contribution was made for the benefit of the

UMW.[14] The Court of Appeals held this instruction to be proper and, therefore, affirmed the conviction for conversion under § 501(c).

In reaching this conclusion, the Court of Appeals seriously misconstrued the statute, in disregard of its legislative history and in conflict with the principles applied by the Second Circuit in one of the leading cases under § 501(c), *United States* v. *Silverman,* 430 F.2d 106 (2d Cir. 1970), *cert. denied,* 402 U.S. 953 (1971).

In *Silverman,* the Second Circuit reversed the conviction of a union officer who allegedly authorized payments of certain printing expenses on behalf of one of the candidates in a New York City mayoralty campaign. Judge Friendly's opinion for the court reviewed the legislative history of the language used in § 501(c) and concluded:

> When Congress in 1959 subjected to criminal sanctions "any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another" any of the assets of a labor organization of which he is an officer or employee, it was not inventing new language. The phraseology resembles that used in

[14] The court instructed the jury on this point as follows:

> During the course of trial there has been mention of the fact that the transfer of the $5,000 to the Labor's Non-Partisan League, and then allegedly to the Democratic Congressional Committee, was ratified by the International Executive Board of the United Mine Workers of America and was made for a legitimate union purpose.
>
> I now instruct you that the defenses of ratification and union purpose are not relevant if you find that the transfer of funds was for a purpose illegal under the laws of the United States, specifically, Section 610. [J.A. 184.]

> defining many "larceny-type" offenses in the criminal code. * * * [D]espite minor variations in language the common thread [in these larceny-type offenses] is that *the defendant at some stage of the game, has taken another person's property or caused it to be taken, knowing that the other person would not have wanted it to be done.* [430 F.2d at 126-127; emphasis added.]

This conclusion is fully supported in the legislative history, where the sponsors of the statute made clear that § 501(c)

> does not limit in any way the purposes for which the funds of a labor organization may be expended * * *. Union officers will not be guilty of breach of trust under this section when their expenditures are within the authority conferred upon them either by the constitution and by-laws, or by a resolution of the executive board, convention or other appropriate governing body * * *. [105 Cong. Rec. 17900 (1959).]

On this basis, the Second Circuit concluded that, at a minimum, the Government must show "*either* a lack of bona fide authorization *or* an absence of benefit to the labor organization from the expenditure," in order to establish a violation of § 501(c) (430 F.2d at 127; emphasis added).

The courts in this case, in contrast, found neither of these elements to be required for conviction. Rather, under their view, a violation of § 501(c) is established even if the officer is acting in accordance with the authorization of his union and for its benefit. The Court of Appeals sought to distinguish *Silverman* on the ground that the contributions to a local candidate there were lawful, while the contribution to federal candidates in this case violated § 610. This difference, however, simply fails to meet the fundamental thrust

of § 501(c) as recognized by the Second Circuit. The statute is designed to insure that union officials fulfill their fiduciary duties to the union and do not use union funds for purposes other than union purposes or without the union's agreement. The fact that an expenditure—a political contribution approved by the union and unquestionably for its benefit—is later found to violate a complex federal statute regulating campaign contributions does not turn it into a criminal conversion of the funds.

This construction of the statute has serious ramifications for all union officers. If the term "conversion" is stretched to include any expenditure that is later found not to have been entirely in accord with every local, state or federal law, the officers approving that expenditure will find themselves subject to the drastic criminal penalties of § 501(c).

If the Court of Appeals decision is permitted to stand, it will mean that union officers must hereafter act at their peril. Clearly wrongful acts of unauthorized use of union funds for personal benefit will be punished, but so will entirely good faith acts pursuant to the authorization of the union for purposes beneficial to the union. This ever-hanging threat is intolerable and will block the effective performance of union officials' duties, which clearly was not intended by Congress.

III.

THE CONSPIRACY CONVICTION RAISES CONSTITUTIONAL QUESTIONS AS TO DOUBLE JEOPARDY AND THE APPLICATION OF THE FEDERAL CONSPIRACY STATUTE.

In addition to the 12 substantive counts, the indictment charged Petitioner in the first count with conspiracy under 18 U.S.C. § 371 to commit the substantive violations. At trial, the Government's evidence

showed that 48 of the 52 overt acts alleged in support of the conspiracy count were integral parts of the substantive offenses charged in counts 2-13. The remaining 4 overt acts were merely the sending of memoranda which were unquestionably insufficient to establish an unlawful conspiracy. Both of the two indicted co-conspirators were acquitted.

In *Pinkerton* v. *United States,* 328 U.S. 640, 643 (1946), this Court stated that a conspiracy charge may not be added to substantive charges where the substantive crime requires a concert of action and there is no element present in the conspiracy that is not also present in the substantive offense. Subsequent cases have recognized that if the same evidence is required for both the substantive and conspiracy counts, prosecution under both is not permitted. *E.g., Pereira* v. *United States,* 347 U.S. 1, 11 (1954).

Under these cases, Petitioner submits that his conviction for conspiracy under count 1 was improper and in violation of the Fifth Amendment protection against double jeopardy. The "crime" of authorizing a campaign contribution necessarily involves other persons in the union organization required to make expenditures, and the so-called "conspiracy" was in reality nothing more than the process of authorizing union expenditures.

Further, even if the conviction does not technically violate the Double Jeopardy clause, Petitioner urges this Court to re-examine the application of the federal conspiracy statute in this context. From the time of Mr. Justice Jackson's extensive criticism of the use of conspiracy charges in his concurring opinion in *Krulewitch* v. *United States,* 336 U.S. 440, 445 (1949), there has been an increasing recognition of the unfair-

ness and abuses resulting from the misuse of § 371. Commentators have increasingly expressed concern about the dangers of unfairness to conspiracy defendants,[15] and judges, too, have expressed the same view. *E.g., United States* v. *Vaught,* 434 F.2d 124, 125 (9th Cir. 1970) (Ely, J., concurring), *cert. denied,* 401 U.S. 976 (1971).

In particular, experience has vividly demonstrated the abuses in the present practice of permitting prejudicial and irrelevant evidence to be used against defendants under the guise of a "conspiracy count" (*see, e.g., Krulewitch* v. *United States, supra,* 336 U.S. at 453), and the present case is an excellent example.

The Government's case at trial established that its own principal witness, Robert Howe, concluded that the League's method of making political contributions was illegal. Howe wrote several memoranda to Petitioner expressing his views. Petitioner promptly took Howe's contentions to the UMW General Counsel, Edward L. Carey, who advised him that Howe was wrong. Fearful that he was indeed correct and that Petitioner and Carey were the ones who were in error, Howe devised an elaborate scheme for making the League's political contributions from Howe's own personal checking account—with either prior or subsequent reimbursement by the League. The evidence also indicated that the defendant Kmetz participated

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[15] E.g., Kircheimer, *The Act, The Offense And Double Jeopardy,* 58 Yale L.J. 513, 518-519 (1949); Goldstein, *The Krulewitch Warning: Guilty by Association,* 54 Geo.L.J. 133 (1965); Klein, *Conspiracy—The Prosecutor's Darling,* 24 Brooklyn L.Rev. 1 (1957); Note, 16 Hastings L.J. 465 (1965); Nathanson, *Freedom of Association and The Quest for Internal Security: Conspiracy from Dennis to Dr. Spock,* 65 Nw.U.L.Rev. 153 (1970).

to a limited extent in at least one such transaction by similarly using his personal checking account. There was no persuasive evidence to support the conclusion that these actions by Howe and Kmetz were anything more than unilateral attempts on their part to minimize detection of what they considered illegal conduct. And yet by means of the "conspiracy" count, the evidence of Howe's and Kmetz's suspicious conduct was admitted into evidence against Petitioner, who was convicted and severely sentenced while Howe was not indicted and Kmetz was acquitted.

The Court of Appeals below felt it lacked authority to undertake revisions of existing rules to curb such abuses. This refusal underscores the necessity for this Court to act.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Court should grant a writ of certiorari and reverse the judgment of the Court of Appeals for the District of Columbia Circuit.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1749

UNITED STATES OF AMERICA

v.

W. A. BOYLE, Appellant.

Appeal from the United States District Court for the District of Columbia

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Argued 2 March 1973

Decided 16 July 1973

Before McGOWAN, TAMM, and WILKEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: Appellant W. A. Boyle is the former president of the United Mine Workers of America.

Convicted on thirteen counts as an officer of the UMW of having (1) consented to unlawful contributions of labor union funds to the campaigns of candidates for federal office,[1] (2) unlawfully converted union funds for the pur-

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[1] This charge was based on the provisions of 18 U.S.C. § 610 (1970), which at the time of the indictment in this case provided:

> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary electioin or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.
>
> Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
>
> For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

pose of making such a contribution,[2] and (3) conspired with others to commit these two offenses,[3] appellant seeks reversal under a number of theories.[4] We conclude that appellant's conviction on all charges was proper and affirm the District Court.

I. *Facts*

Labor's Non-Partisan League (League) was created in 1936 by the Congress of Indiustrial Organizations (CIO) to act as its legislative and lobbying arm. In 1940 the

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[2] This charge was based on the provision of 29 U.S.C. § 501(c) (1970), which provides:

> Any person who embezzles, steals, *or unlawfully and willfully abstracts or converts* to his own use, or *the use of another*, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both. (Emphasis added.)

[3] This charge was based on the provisions of 18 U.S.C. § 371 (1970), which provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[4] The full text of the thirteen-count indictment is set forth in the Joint Appendix at pp. 18-33. Count I of the indictment alleged that appellant and two other individuals conspired in violation of 18 U.S.C. § 371 (1970) to violate two federal statutes—18 U.S.C. § 610 (1970) and 29 U.S.C. § 501(c) (1970). Counts II through XII of the indictment charged appellant with eleven substantive violations of 18 U.S.C. § 610 (1970). Count XIII of the indictment charged appellant with a substantive violation of 29 U.S.C. § 501(c) (1970).

UMW left the CIO to become a separate entity. At that time the League as originally constituted disbanded, only to be immediately reconstituted as the lobbying and information branch of the UMW alone.

In persons and in property the League and the UMW have been closely identified. Since 1940 the president of the League and the current president of the UMW have been one and the same. From the time of the separation in 1940 until the time of the indictment in this case the League received all but a small portion of its funds from the UMW's general treasury.[5]

In 1947 Congress passed legislation which prohibited some forms of political contributions by labor organizations to candidates for federal office.[6] Following the Act's passage the League made no more contributions to federal candidates until the mid-1960's.

In 1963 appellant Boyle became president of the UMW and automatically chairman of the League. In 1966 the UMW began again to be solicited for contributions by candidates for federal office, chiefly those who had recently discovered the "testimonial dinner" as a fountain of funds. Boyle knew of and authorized contributions which were made out of the League's treasury for this purpose, as the trial jury found.[7]

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[5] There is actually no evidence in the record that the League's funds came from any source other than the UMW general treasury. The Government, however, was unable to prove the origin of a relatively small portion of the League's funds during the period of 1942 to the time of the offenses in this case. Thus, we do not *know* that *all of* the League's funds came from the UMW treasury. Appellant attempts to make much of this inability to prove the source of this small portion of the League's funds. This inability is, however, irrelevant, as we shall illustrate in Part IIA, *ante*.

[6] *See* footnote 1, *supra*.

[7] We do not understand appellant to contest these sufficiency of the evidence to support these and other facts stated in this section of our opinion.

Robert Howe, director of the League for a part of the time in question, testified that he was concerned that contributions by the League might violate 18 U. S. C. § 610, which makes it "unlawful . . . for any labor organization to make a contribution" to a federal campaign. He testified that he and James Kmetz, another employee and Howe's successor as director, sought to hide the source of these funds by having checks on the League's account made out to cash, depositing the proceeds in their personal accounts, and then making the contributions with a personal check. The evidence is sufficient to permit a conclusion that Boyle knew and approved of this practice, that he knew of Howe's fears that the contributions were illegal, and that he knew and approved of efforts to conceal the source of the funds involved.

Monthly statements of these transactions were prepared. Appellant's executive secretary, Suzanne Richards, instructed that only one copy of this be sent to Boyle's office and that no copies be kept in the files of the League. Richards also instructed Howe to destroy any evidence that might incriminate Boyle or the UMW.

In the spring of 1969 the League's treasury was depleted. At the request of Kmetz, Boyle authorized a transfer of $5,000, which he characterized as a "loan," from the UMW treasury to the League. The jury concluded that this amount was actually transferred to facilitate the making of a political contribution by the League[8] This transfer was ratified by the International Executive Board of the UMW over two years after the "loan" in question.

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[8] Count XIII of the indictment charged appellant with violating 29 U.S.C. § 501(c)(1970), by transferring the $5,000 from the UMW to the League account. Count XII of the indictment charged appellant with violating 18 U.S.C. § 610 (1970) by authorizing this $5,000 to be used as a campaign contribution.

II. *Legality of the Political Contributions*

As of the date of the indictment in this case, 18 U.S.C. § 610 (1970) provided in relevant part:

> It is unlawful for . . . any labor organization to make a contribution or expenditure in connection with . . . [a federal election].
>
> [E]very . . . officer of any labor organization, who consents to any contribution or expenditure by the . . . labor organization . . . in violation of this section, shall be . . . [fined and/or imprisoned].

The trial court found that the contributions described above constituted a violation of this Act, and that appellant Boyle was subject to fine and imprisonment for consenting to these contributions. Appellant contends that his conviction under this statute was invalid because: (A) the Government did not allege or show and the jury did not find that the funds contributed came from an "involuntary" source prohibited under the statute, and (B) the statute is an unconstitutional infringement on the union's freedom of speech.

A. *The Need to Show an "Involuntary" Source.*

On its face § 610 requires that the Government establish five distinct elements in order to prove a violation. The Government must prove beyond a reasonable doubt that (1) a labor organization (2) made a contribution or expenditure (3) in connection with a specified federal election (4) for purposes of active electioneering and that (5) the defendant officer consented to the making of the contribution Appellant does not contest that the jury was properly charged on these elements, nor that there was sufficient evidence to permit the jury to find that these elements had been proved.

Appellant contends, however, that an additional element must be established to support a guilty verdict under

§ 610. He argues that there is a violation if, and only if, money ultimately contributed to a political candidate was collected by that union or organization through payments "actually or effectively required for employment or union membership."[9] Such funds would, for example, be money collected from members in the form of dues or assessments and may be characterized as being given "involuntarily" to the union or affiliated organization in order for a person to remain a member of the union. Appellant contends that only contributions of such "involuntary" funds are forbidden, that the union is free to contribute any other funds it controls if those funds come from a "voluntary" source. Such a voluntary source, according to appellant, could be contributions by union members not required for membership or gifts to the union from outside sources.

Appellant's argument is based on language in the Supreme Court's decision in *Pipefitters* v. *United States*.[10] That decision held that not all political contributions by labor organizations are prohibited by § 610, but only those derived from funds which "were actually or effectively required for employment or union membership."[11] This additional element of the offense in *Pipefitters* was found by the Supreme Court not in the express language of the statute, but rather in the legislative history of the enactment. The opinion reversed the convictions because the "jury instructions failed to require proof of [this] essential element of the conviction . . ."[12] Appellant argues that in Boyle's case, as in *Pipefitters*, the jury was not in-

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[9] Appellant's brief at 14, quoting the Supreme Court's decision in *Pipefitters* v. *United States*, 407 U.S. 385 at 439 (1972).

[10] 407 U.S. 385 (1972).

[11] *Id.* at 439.

[12] *Id.* at 436.

structed and did not find that the contributions came from an "involuntary" source.

We believe, however, that appellant misconstrues the import of the language relied on in *Pipefitters*. The Court there repeatedly emphasized that its discussion dealt with a separate, segregated fund in which there was "strict segregation of its monies from union dues and assessments."[13] The *Pipefitters* fund was composed of contributions by union members that were not required for membership and which at least superficially did not appear to have been the product of a coercion. 'Strict segregation," combined with the appearance that the funds were not coerced from union members, raised a presumption that the money contributed was derived from a "voluntary" source. Logically, when the union has taken the precautions necessary to make it appear that the funds were given voluntarily for use in political campaigns, the burden should be on the Government to prove the contrary.

In Boyle's case, though, contributions were made from funds derived from the general UMW treasury, which was composed predominatly of dues, assessments and other "involuntary" funds. The UMW made no effort to segregate dues and assessments from funds that might be legally contributed to political campaigns.

The legislative history of § 610 reveals Congress" primary concern that funds from a general union treasury not be available for federal politcal campaigns.[14] The Court in *Pipefitters* explicitly interpreted the section as being designed to prohibit expenditures from the "general union treasury."[15]

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[13] *Id.* at 414. For other references in the opinion to the need to keep political funds separate from the general union treasury, *see id.* at 401, 416, 417, 421 and 429.

[14] *See* the analysis in *Pipefitters, supra,* at 407-14 and 416-27.

[15] *Id.* at 414.

The clear intent of § 610, as evinced in the legislative history and interpreted by the Supreme Court, is to *permit* expenditures from separate, segregated funds if the contributions to it were, in truth, voluntary, and to prohibit expenditures from a union's general treasury.[16] If the Government proves that the source of the funds directed to a political contribution is the general union treasury, derived in part from dues and assessments, this is all that need be established on the question of voluntary or involuntary contributions.

This interpretattion is the only one consistent with policies underlying § 610. Appellant's contention, stripped of legalisms, is that the Government must show in all circumstances that the contributions *could not* have come from a "voluntary" source. Since the funds expended here were derived from the UMW general treasury, this reading would require the Government to determine the sourc of all funds that have flowed through the treasury during the period in question, and to prove that this amount (which could run into the hundreds of millions) could not have been derived from a voluntary source. This would place an insuperable burden on the Government; likewise, and even more perniciously contrary to the avowed objectives of the Act, it would also place a prem-

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[16] If "voluntary" and "involuntary" funds are commingled and then a portion is expended for political purposes, it is impossible to tell whether the "voluntary" or the "involuntary" money is being expended. One can only assume that a proportionate share of each is being spent. Thus, Congress in prohibiting expenditures from commingled funds will be presumed to consist of proportionate shares of the different types of money. For this reason it was irrelevant that the Government was unable to show the source of a small portion of the money in the League treasury. A substantial, or huge, portion of the money in the League treasury was "involuntary" at the time of the contribution. This "involuntary" portion may be presumed to be a part of each expenditure from the commingled funds.

ium on poor bookkeeping by discouraging unions from maintaining complete records of revenue. The resulting difficulty in tracing the sources of union contributions would make § 610 virtually useless.

In *Pipefitters* the Court held that solicitation of contributions for the segregated political fund "must be conducted under circumtances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union's institutional power."[17] There is no contention that there was ever a report to the UMW membership that any transfers were being made from the general UMW treasury to the League. In fact, evidence shows that steps were taken to conceal this. Appellant's argument on voluntariness thus is in first and last analysis an argument that "contributions" by UMW members were "voluntary" when the individual UMW member knew, and could have known, nothing about his own "contribution." Congress intended to protect individual union members against both overtly coerced and unknown contributions; each is equally involuntary.

Boyle's case, involving transfers from the UMW general treasury derived principally from dues, assessments, and other obligatory member contributions, is thus different from *Pipefitters*. Where there are *individual* contributions to a fund which is ostensibly set up as a separate "voluntary" affair, then there is a rational justification for requiring the Government to prove, and the jury appropriately to be so charged, that the contributions ultimately employed politically were involuntary. This the Supreme Court held in *Pipefitters*. But in Boyle's case the "contributions" to the separate fund, the League, were alleged to be a series of massive infusions from the

[17] 407 U.S. at 414.

UMW's general treasury, not a multitude of contributions from individual members, as in *Pipefitters*. Boyle's evidence raised no issue of the "voluntariness" of individual members' contributions to the UMW general treasury; quite the contrary, dues, assessments and other obligatory payments were accepted as making up the individual members' contributions.

Hence a jury charge of the style found necessary in *Pipefitters* would have raised an issue of "voluntariness" of individual contributions that does not exist in Boyle's case; the undisputed evidence establishes the involuntary nature of the members' contributions to the UMW general treasury; the jury should never have been permitted to find that individual members authorized "voluntary" political contributions of which they knew nothing, and the jury was not so instructed.

The proper issue here, by which the Government was required to and did satisfy its burden of proof of involuntariness, was the source of the funds transferred into the League account. If this source was the UMW general treasury, its nature established the funds as involuntarily obtained from the UMW members; no subsequent legerdemain by an official or board of the UMW could make voluntary what had been involuntary in origin. Clearly, the indictment here alleged that the source of the contribution was the UMW general treasury.[18] Sufficient evidence was adduced at trial to permit the issue to reach the jury, and the jury was properly instructed that it must

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[18] Joint App. at 3. As the Supreme Court said in *Pipefitters*: "... an indictment that alleges a contribution or expenditure from the general treasury of a union or corporation in connection with a federal election states an offense. *See* nn. 47 and 48, *infra*. The unanimous vote of the union members or stockholders may at most (but we need not now decide) be a defense." 407 U.S. at 416 n. 28.

find that the contributions came from such funds.[19] The Government, consequently, established and the jury found all of the elements necessary to show a violation of § 610.

B. *The Constitutionality of § 610*

Appellant argues that even if *Pipefitters* does not compel reversal, the convictions under § 610 must be overturned because that statute imposes an unconstitutional limitation on the union's freedom of speech. He does not dispute that Congress may legitimately regulate federal campaign financing and that there must be valid reasons to limit spending by a union. Appellant contends, however, that the legitimate goals of the statute may be achieved in a manner that will not so substantially restrict the union's right to present its views by supporting candidates of its choice. If it is true that the legitimate goals of the statute may be achieved in a less restrictive manner, the statute is overbroad. Even when a compelling interest exists, if the statute protects that interest by a needless infringement of First Amendment rights, it must be struck down.[20]

Appellant seeks to invoke this principle by pointing to one purpose of § 610, to assure the purity of the federal electoral process by preventing undue influence by labor unions who might use the aggregated wealth of their general treasuries in federal elections. He then contends that this goal may be achieved less restrictively by limiting the maximum amounts which could be contributed by unions, rather than by banning contributions entirely. This misapprehends the scope and scheme of § 610. That provision, as interpreted in *Pipefitters,* only prohibits

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[19] Joint App. at 177-78.

[20] *See, e.g., Shelton* v. *Tucker,* 364 U.S. 479 (1960). The issue of the statute's constitutionality was explicitly preserved in *Pipefitters, supra,* at 400.

contributions from monies which are not strictly segregated from union dues and assessments.[21] Appellant's suggested alternative would actually be more restrictive than § 610; unions may now contribute *any amount* so long as it is from a proper source, while under appellant's suggestion the maximum would be limited.

Appellant then points to a second purpose of § 610, to assure that a dissenting union member is not *forced* to contribute, in the form of mandatory dues and assessments, to support political views with which he disagrees. Appellant contends that this admittedly justifiable goal of protecting minority interests could be protected less restrictively in one of two ways.

First, appellant asserts that minority interests are adequately protected by the "democratic" procedures under which a union must operate. It is argued that majority approval of political expenditures would somehow validate the unwanted burden placed upon dissenters. Democratic majority rule does not, in itself, necessarily protect minority interest. Indeed, it is based on the premise that the losing side (the minority) must accept the dictates of the winning side (the majority). Democracy in labor unions as elsewhere, without additional protection, does nothing more than hold forth the possibility that in time the minority may become the majority. By definition the protection of minority interests requires that the majority be restrained in exercising its will over the minority. If a union could expend "involuntary" funds upon the vote of a majority of its members, minority interests would not be protected—they would be rendered irrelevant.

Second, appellant argues that Congress could have protected minority rights by adopting the mechanism employed in Great Britain. This permits the refunding of

[21] *See* text accompaning footnotes 10-12, *supra.*

a proportionate amount of a member's dues if the dissenter gives notice of his disagreement. Appellant argues that

> [l]egislation protecting the minority union member could be drawn to permit either of two forms: "contracting in," in which all members approving of the proposed political assessment would be required to give affirmative evidence of such approval, or "contracting out," in which a union member objecting to the political use of a portion of his dues could refuse to tender that particular assessment."[22]

This argument ignores the fact that § 610, as interpreted in *Pipefitters*, does establish a system of "contracting in" just as appellant suggests. Unions are permitted to make contributions if assenting members "give affirmative evidence of such approval" by assenting to having a deduction made from the member's pay check.[23]

Assuming, only arguendo, that § 610 does restrict in some degree a union's otherwise unlimted right of free speech, appellant has failed to advance a less restrictive alternative to § 610 which will both prevent the use of a union's aggregate wealth in federal elections and protect union minority interests, and we have found elsewhere no such viable less restrictive alternative. We hold § 610 to be constitutional.

III. *The § 501 Conviction.*

Appellant allegedly violated 29 U.S.C. §501(c) (1970), which provides that

> any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities,

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[22] Appellant's Brief at 36.

[23] *Ibid.*

> property, or other assets of a labor organization of which he is an officer . . . [will be subject to fine or imprisonment].

The jury found that appellant violated this law by ordering the transfer of the $5,000 "loan" described above from the UMW general treasury to the League treasury with the knowledge and for the purpose of making a political contribution. Appellant does not contest that the transfer was a conversion of union funds to "the use of another." Rather, appellant argues that for two reasons this conversion was not unlawful.

First, relying on the Second Circuit's opinion in *United States* v. *Silverman*,[24] appellant argues that such a transfer violates §501(c) only if the jury finds that (1) the conversion was made without a bona fide authorization by the union, or (2) that the union derived no benefit from the transfer. Appellant's reliance upon the *Silverman* rationale is misplaced. The *use* to which the money was converted in that case, support of a candidate for state office, was not unlawful. The court stressed that there was no legal bar to the use *if* the transfe was properly authorized by the union.[25]

Regardless of the validity of the Second Circuit's analysis is situations where the use is lawful, the holding in *Silverman* has no relevance here. In the instant case the use to which the money was converted could not have been lawful. As we have seen, the contribution of the $5,000 constituted a violation of §610. Neither authorization by any union officer or body, nor any resulting benefit to the union, would have rendered lawful the transfer of general union funds to a federal political campaign. In

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[24] 430 F.2d 106 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971).
[25] *Id.* at 412.

Pipefitters[26] the Supreme Court specifically reserved the question whether even a *unanimous* vote of all union members could validate a union political contribution under §610.

Thus, approval or benefit cannot make the conversion to "the use of another" in this case any less unlawful. If the use to which the money is knowingly transferred is unlawful, then the transfer constitutes a violation of § 501(c). The jury was properly instructed that this was the applicable standard, that it had to find the appellant authorized the transfer knowingly for the purpose of making indirectly a political contribution, and there was sufficient evidence to support its conclusion.[27]

Second, appellant seems to argue that §501(c) was intended to punish union officials only if the jury finds that the officer did not have at the time a "bona fide belief in the legality of his action . . ."[28] The argument is that the statute is intended to punish only *knowingly* illegal or *ultra vires* expenditures, and that union officials will be granted great latitude in forming their bona fide beliefs as to whether an expenditure is within the legal objectives of the union organizatoin. Under this reading, §501(c) would never punish for a transfer, even if the official knew that the money was to be used for an unlawful purpose, if the official could have reasonably believed that the transfer was authorized under the union's constitution, bylaws, and procedure. Appellant contends that he was prejudiced by the court's refusal to permit him to argue as a defense that he believed the transfer was authorized.

This interperetation is founded upon passages in the Congressional debates on the statute in which individual

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[26] See quotation in n. 18, *supra.*

[27] Joint App. at 184.

[28] Appellant's Reply Brief at 10.

Congressmen discussed, in general terms, the Labor-Management Reporting and Disclosure Act of 1959, of which §501(c) is a small part.[29] The thrust of the dialogue relied upon is that the Act will not punish an officer for an expenditure

> [i]f it is made in accordance with, and for a purpose permitted by, the constitution, bylaws or regularly adopted resolutions of the union's constitutional governing bodies, the officer or employee will not be required at his peril to determine whether or not the constitution, bylaws or resolution goes beyond the legitimate purposes and objectives of the organization.[30]

The relevance of this language in this context is at best ambiguous, and the remarks by individual Congressmen made during a floor debate are not the most persuasive form of legislative history. We believe, in any case, that the remarks relied upon do not support appellant's reading of the statute. The passage simply says that a transfer will not be deemed unlawful merely because it is made for a purpose that is *ultra vires* what the court determines to be the legitimate functions of a union.

As we have noted, however, the transfer in this case was not for a purpose that was *ultra vires,* but rather for a purpose that was itself a crime. There is no hint in either the statute or its legislative history that indicates a Congressional intent to excuse from the ambit of §501(c) transfers for a criminal purpose. No officer or union governing body could in all logic believe that a transfer for a criminal purpose was for a legitimate union purpose, was

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[29] 105 Cong. Rec. 17900 (1959) (remarks of Senator Kennedy); 105 Cong. Rec. 15690 (1959) (remarks of Congressman O'Hara).

[30] 105 Cong. Rec. 15690 (1959) (remarks of Congressman O'Hara).

authorized by the union constitution or bylaws, or was for the union's benefit.

Appellant argues that our construction means that §501(c) duplicates 18 U.S.C. §610, which was discussed above. The argument is that Congress could not have intended to enact two statutes that punish officers for contributions to federal political campaigns, and hence §501(c) must be construed as requiring something that is not required for a violation of § 610—specifically, knowledge that the act is unauthorized.

This argument fails, because the statutes as we construe them do not punish identical conduct. Section 610 punishes officers who "consent to" political contributions. Section 501(c) punishes, in this case, an officer who "abstracts or converts" union funds to use in a federal political campaign. The first statute is violated by an officer who simply knows of and acquiesces in the expenditure of union funds for a political campaign; the second requires some affirmative action to transfer union funds for this or any other unlawful purpose, and the unlawful objective may or may not have anything to do with prohibited union political contributions.

IV. *Conspiracy to Commit the Substantive Offenses*

Count one of the indictment charged that appellant conspired with Owens, Kmetz, Richards and another alleged co-conspirator to commit the substantive acts of conversion and unlawful contributions to federal campaigns. Appellant does not contest that if the conversion and contribution were indeed unlawful, that there was sufficient evidence of a conspiracy to commit those crimes to permit the submission of the issue to the jury. Rather, he argues that the same proof was introduced to prove the conspiracy and the substantive counts, and that he was consequently convicted twice for the same offense in violation of the double jeopardy clause of the Fifth Amend-

ment to the United States Constitution. Under this theory, the substantive and conspiracy counts would have merged into a single offense and the Government could not have proceeded under both. Appellant also suggests that while the conspiracy conviction may have been proper in a narrow technical sense, this court, under its general supervisory power over federal criminal trials, may set aside the conspiracy conviction as being somehow unfair or unjust.

A. *Double Jeopardy*

"It is settled law in the country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. See *Pinkerton* v. *United States*, 328 U.S. 640, 643-44, and cases cited therein. Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy."[31] It is also irrelevant that the "overt acts charged in the conspiracy counts were also charged and proved as substantive offenses."[32] This general rule is based on the fact that

> a combination of persons to commit a wrong, either as an end or as a means to an end, is so much more dangerous because of its increased power to do wrong, because it is more difficult to guard against and prevent the evil designs of a group of persons than of a single person, and because of the terror which fear of such a combination tends to create in the minds of people.[33]

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[31] *Pereira* v. *United States*, 347 U.S. 1, at 11 (1954).

[32] *Pinkerton* v. *United States*, 328 U.S. 640 at 644 (1946).

[33] *Dennis* v. *United States*, 341 U.S. 494, 573 (1951) (Justice Jackson concurring), citing from Miller on Criminal Law, 110; *see, e.g., United States* v. *Rabinowich*, 238 U.S. 78, 88 (1915); *Pinkerton* v. *United States*, 328 U.S. 640, 643-44 (1946).

Appellant argues that since the same proof was introduced to prove both the conspiracy and substantive offenses, there is an identity of offenses requiring a merger. The issue, however, does not turn on the identity of evidence actually produced but on whether the same evidence is *required* to prove the two offenses. In this case, the requirements for conviction under the conspiracy count were the agreement between Boyle and at least one co-conspirator and the doing of at least one overt act (not necessarily making the contribution) in furtherance of that agreement. Consummation, or success, of the conspiracy was unnecessary. In order to convict under any of the substantive counts, the crime must have been completed—*i.e.*, the contribution actually made. It is also clear that appellant could have been convicted on the substantive counts without proving an agreement between himself and the co-conspirators charged in Count I. Therefore, §610 and the conspiracy statute do not punish the same thing.[34]

There is, however, an exception for situations in which the conspiracy to commit a crime produces no additional danger to society. If the statute defining the substantive offense requires concerted action and none participated other than the necessary parties, there is no additional danger and a charge of conspiracy to violate the statute will not lie:

> There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See *United States* v.

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[34] Cf. *Pereira* v. *United States, supra,* at 11-12. See *Woods* v. *United States,* 99 U.S. App. D.C. 351, 240 F.2d 37, *cert. denied,* 353 U.S. 941 (1958).

Katz, 271 U.S. 354, 355-356; *Gebardi* v. *United States*, 287 U.S. 112, 121-122.[35]

Taking these principles as established, it is clear that both statutes here involved, 18 U.S.C §610 and 29 U.S.C. §501(c), may be violated without necessarily involving any concerted effort of the alleged co-conspirators in this case. While §610 arguably might require the concert of both a union officer who consents to a political contribution and a candidate who receives the contribution, yet the conspiracy to violate §610 as charged here involved more than these two statutorily necessary parties; other union officers and employees in addition to appellant were involved in the conspiracy. Section 501(c), likewise, did not require the concert of the parties to this conspiracy. That statute may be violated by a union officer acting alone who "willfully abstracts or converts" union funds. Consequently the conspiracy to violate these statutes charged here does not fit within the narrow exception described above, but rather is governed by the principles set forth in *Pereira* v. *United States, supra.*

Appellant attempts to confuse the issue by arguing that on the facts of this case all of the alleged co-conspirators were required as a practical matter in order to violate §§ 501(c) and 610. For example, appellant states that he could not have drawn the checks on the League account without the endorsing signature of one of the co-conspirators; this co-conspirator is therefore argued to be "necessary" for the completion of the offense in this case.[36] The practical test of what is necessary under given circumstances is not the decisive test; the critical factor is that

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[35] *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946).

[36] This co-conspirator was not "necessary" to the offense since appellant could have simply forged the signature of the co-signer of the check. At best, appellant's argument is that he would have had to commit the crime of forgery in order to complete the crime of contribution without the co-conspirator.

this co-conspirator was not required to exist by the statute as an element of the offense. He was only "necessary" in the sense that a skillful getaway driver may be "necessary" to a successful bank robbery; he may have made the crime easier to commit, but he was not a necessary element of the crime as it is described in the statute. A participant is "necessary" to the commission of a crime, for purposes of merging substantive and conspiracy counts, if the substantive statute requires the person's existence as an abstract legal element of the crime. Here that is simply not the case.

B. *The Court's Supervisory Power*

Appellant argues that this court should exercise its "supervisory power over federal criminal trials"[37] and overturn his conviction for conspiracy. This argument is based essentially on the contention that the use of conspiracy offenses may be suject to abuse in the hands of zealous prosecutors, who may allege conspiracy in an effort to gain tactical advantages, *e.g., otherwise* irrelevant evidence admitted. Appellant does not argue on this point that the conspiracy conviction was rendered in violation of currently applicable legal standards.

In effect appellant is asking this court to change the law of conspiracy — because the current law is unfair or bad policy. He cites no authority compelling this limitation and does not suggest a standard which we might adopt for determining when a conspiracy conviction might be allowed.[38] He simply asks that we ignore the fact that his

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[37] Appellant's Brief at 47.

[38] Appellant refers to Judge Ely's concurring opinion in the decision in *United States* v. *Vaught*, 434 F.2d 124 (9th Cir. 1970), as support for his argument. A reading of Judge Ely's brief comments makes it clear that he did not feel that the sort of relief requested here is possible under existing law. He is, rather, expressing a desire that such a change in the law be made at a future time. *Id.* at 125.

conviction is lawful under Supreme Court authority and reverse the trial court. Precedent, prudence, and modesty compel us to decline.[39]

V. *Conclusion*

For the foregoing reasons, all convictions are

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

W. A. BOYLE ET AL., *Defendants*.

Crim. No. 1741-71.
Feb. 28, 1972

RICHEY, District Judge.

This case came before the Court on the Motions of the defendants, W. A. Boyle, John Owens and James Kmetz, by their attorneys, to Dismiss the Indictment, pursuant to Rule 12 of the Federal Rules of Criminal Procedure. Upon the consideration of all the evidence adduced at the hearing, the memoranda of both the Government and the defendants, and the oral arguments of counsel for the respective parties, the Court concludes that the Motions to Dismiss should be denied for the reasons hereinafter set forth.

Although each defendant filed a separate Motion to Dismiss, the grounds asserted in support of each motion were substantially the same. In this opinion the Court will note

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[39] *See* cases cited in footnotes 30-33, *supra*.

any particular ground raised by one defendant which was not raised by the other defendants in order to prevent confusion. Basically, the following grounds have been stated in support of the motions:

(1) That the statute, 18 U.S.C. § 610 (1970), under which the defendants were indicted, is unconstitutional on its face and as applied in the instant case.

(2) That the statute 18 U.S.C. § 610 (1970), is vague and indefiinite and fails to adequately define an offense against the United States in violation of the Sixth Amendment to the United States Constitution.

(3) That the counts of the Indictment are offensive to the Sixth Amendment to the United States Constitution in that they are vague, indefinite and uncertain and fail to adequately inform the defendants of the nature and cause of the accusation against them so as to enable them to plead double jeopardy or collateral estopped or acquittal at any future trial for a similar offenses.

(4) That Count 1 of the Indictment alleges several separate and distinct conspiracies and, thus, more than one crime within a single count and therefore constitutes a prejudicial misjoinder of offenses.

(5) That Counts 2 to 13, both inclusive, with respect to defendant Boyle, and Counts 1 and 7 with respect to defendant Owens, of the Indictment each charge the defendants with the same offense as that charged in Count 1 of the Indictment in violation of their constitutional right under the Fifth Amendment to the Constitution of the United States not to be subject for the same offense to be twice placed in jeopardy of life or limb.

(6) That Count 13 of the Indictment is too broad, lacking in particularity and specificity, indefinite, inconsistent, duplicitous and therefore violates the Sixth Amendment to the Constitution of the United States, because it does not inform the defendant Boyle with particularity and

specificity of the nature and cause of the accusation contained therein and constitutes a denial of due process under the Fifth Amendment to the United States Constitution.

(7) That Count 13 of the Indictment fails to charge the defendant Kmetz with a violation of a federal law.

(8) That the Indictment, and each count thereof, is barred by the Statute of Limitations.

(9) That there were unauthorized persons in the Grand Jury room.

(10) That the statute, 18 U.S.C. § 610 (1970), is being discriminatorily enforced.

(11) That Count 13 of the Indictment fails to allege that the monies and funds of the United Mine Workers of America were used against the wishes of the members of that organization or that the defendants, W. A. Boyle and James Kmetz, were without authority of said United Mine Workers of America to do what they are alleged to have done.

(12) That defendant Owens was compelled to testify before the Grand Jury which indicted him at a time when he was a potential defendant in the instant case, thereby abridging his rights under the Fifth Amendment to the United States Constitution.

(13) That the Indictment in Criminal No. 1741-71, which superceded the Indictment in Criminal No. 346-71, was returned without the re-examination of any witnesses or records upon which the Indictment in Criminal No. 346-71 was found and without the introduction of any new evidence in violation of the defendants' rights under the Fifth Amendment to the United States Constitution.

(14) That the defendants have been denied their rights to a speedy trial as provided by the Sixth Amendment to the United States Constitution.

Constitutionality of 18 U.S.C. § 610 (1970)

The defendants challenge the constitutionality of 18 U.S.C. § 610 (1970) on several grounds ranging from abridgment of free speech under the First Amendment to discriminatory enforcement in violation of the due process clause and equal protection. The Court will treat each issue separately in order to prevent confusion.

First Amendment

Defendant Boyle argues that 18 U.S.C. § 610 (1970) (hereinafter referred to as § 610) violates a union member's right of association and his right of free speech, which are both guaranteed to him under the First Amendment to the United States Constitution. The constitutionality of the statute was recently upheld in United States v. Pipefitters Local Union No. 562, 434 F.2d 1116 (8th Cir.), aff'd on rehearing en banc, 434 F.2d 1127 (1970), cert. granted, 402 U.S. 994, 91 S.Ct. 2168, 29 L.Ed.2d 160 (1971). In the Pipefitters' case the court noted that the First Amendment clearly protects freedom of association, and that the activities of a labor union fall within the purview of this protection. *Id.* at 1122. However, the Court was careful to point out that the rights of association are not absolute and may be regulated by the government in certain instances. *Id.* at 1122. *See also* Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951).

In order to permit the government to regulate in a constitutionally protected area, such as freedom of association or freedom of speech, a court must weigh the interests of the respective parties. In the instant case the Court must examine and balance the interests of the government in having such a regulation and the organization's interest in its freedom of association. Only if the government's interest is compelling, will the statute retain its enforceability under the Constitution. This Court agrees with the *Pipe-*

fitters' court where it stated that the government has a compelling reason.

> "[s]ince it is possible for a person to be required to join a union as a condition of employment, one of the purposes for the passage of 18 U.S.C.A. § 610 was to 'protect union members holding political views contrary to those supported by the union from use of funds contributed by them to promote acceptance of those opposing views." *Id.* 434 F.2d at 1123.

Furthermore the *Pipefitters'* court stated:

> "Congress in passing 18 U.S.C.A. § 610 was attempting to protect the individual union member's right to his own political views and the right to support or not to support them through money contributions. In light of the substantial interest each individual has in his own political activities, it follows that Congress in passing the legislation was responding to a compelling interest." *Id.* at 1123.

This Court finds that the statute is sufficiently narrow on its face and in its application so that it does not unnecessarily infringe on Constitutional rights beyond those where the government has demonstrated a compelling interest in regulating. The individual union member can still join or make contributions to separate voluntary political organizations, since these activities are not in any way proscribed by the statute. The union however, is precluded from making the contributions for him. The union can engage in a wide variety of political activities without violating the statute, such as active political endorsement through the medium of regular union newspapers and other house organs directed primarily to the union's membership. *See, e. g.*, United States v. C.I.O., 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948). It is only when the union engages in active electioneering on behalf of particular Federal candi-

dates with the idea of reaching the public at large rather than its own membership, that the statute's proscription against the use of general union funds becomes applicable.

In United States v. Auto Workers, 352 U.S. 567, 588-89, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957), the United States Supreme Court thoroughly analyzed the purposes of § 610. Essentially, they are twofold: (1) to prevent corruptive influences on the elective process; and (2) to prevent the use of general union funds to support ideas and candidates opposed by even the slightest minority of the union membership. *Id.* at 568-89, 77 S.Ct. at 529. The Supreme Court stated that:

> "[The statute's] aim was not merely to prevent the subversion of the integrity of the electoral process. Its underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *Id.* at 575, 77 S.Ct. at 533.

This Court finds no reason to reject what appears to be a legitimate governmental objective, and therefore holds that the statute is constitutional with respect to the First Amendment, and with respect to its application in the instant case. The Indictment clearly alleges that monies from the union were used or directed toward political activities expressly prohibited by the statute. Furthermore, the Court believes that indirect transmission of the funds is no less illegal than direct transmission. The purpose of the statute is to preclude use of funds from general union dues for electioneering purposes in Federal elections. Although the statute does not expressly preclude indirect contributions from general funds of the union, the legislative history and the Supreme Court's opinion in United States v. Auto Workers, *supra,* clearly indicates that Congress wished to prohibit any type of use of the general

union funds for the designated purposes of the statute. This would include both a direct and/or an indirect contribution or expenditure.

Article 1, Section 2, and the 17th Amendment to the Constitution

The Court finds little merit to this argument, since as indicate earlier in this opinion, the individual union member is still free to join a political organization or to send a contribution to such an organization. In addition, he still maintains his individual right to choose the congressional candidate of his choice at the ballot box. Section 610 merely prohibits the union from infringing upon this individual right by prohibiting general union funds from being used to support candidates or political causes which the individual union member may not agree with.

Due Process and Equal Protection

The defendants argue that §610 arbitrarily discriminates against the unions and their members in violation of due process and equal protection. In United States v. Petrillo, 332 U.S. 1, 8-9, 67 S.Ct. 1538, 91 L.Ed. 1877 (1941), the Supreme Court held that Congress has the power to act selectively, and that the fact a prohibition directed at one class does not reach every other class upon which Congress may constitutionally place limitations, does not render the particular prohibition invalid. As the Supreme Court stated in United States v. C.I.O., *supra*:

> "It was felt that the influence which labor unions exercised over elections through monetary expenditures should be minimized, and that it was unfair to individual union members to permit the union leadership to make contributions from general union funds to a political party which the individual member might oppose." *Id.* 335 U.S. at 115, 68 S.Ct. at 1354.

The preceding statement clearly indicates the reason Congress placed the prohibition on labor unions, and this Court believes that the classification is rationally based.

The *Pipefitters'* court dispells the equal protection argument where it states:

> "The problem with this argument is that § 610 does not prohibit working men from such activity. Section 610 only prohibits them from being forced into it. Therefore, § 610 does not create a classification which is subject to an equal protection claim." *Id.* 434 F.2d at 1124.

Vagueness

Defendant Boyle argues that § 610 is vague and indefinite and fails to adequately define an offense against the United States in violation of the Sixth Amendment. The test for constitutional vagueness is described in United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954) as follows:

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.* at 617, 74 S.Ct. at 812.

Furthermore, in Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961), the Supreme Court added:

> "The vice of unconstitutional vagueness is further aggravated where, * * * the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Id.* at 287, 82 S.Ct. at 281.

Essentially, the vagueness problem narrows down to whether a person could know from reading § 610 what is prohibited by its terms. *See* United States v. Pipefitters Local Union No. 562, *supra*, 434 F.2d at 1124.

The Indictment in the case at bar clearly alleges that a direct contribution was made by a labor organization to candidates seeking Federal offices. Section 610 unequivocally proscribes such conduct. As the court in United States v. Pipefitters Local Union No. 562, *supra*, stated:

> "A labor organization can predict what its officials and employees may do by evaluationg the organizations' duty under § 610 and not allow its officials and employees to engage in conduct which is inconsistent with this duty." *Id.* 434 F.2d at 1124.

The Constitution requires that the statute convey a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." United States v. Petrillo, 332 U.S. 1, 8, 67 S.Ct. 1538, 1542 (1941). The Court believes that the preceding standards have been met by § 610, and that the statute therefore is not vague or indefinite.

Discriminatory Enforcement

The Court has already given full consideration to defendant Boyle's argument relating to discriminatory enforcement in its opinion dated September 27, 1971, which is adopted and made a part hereof by reference.

MULTIPICITY

Defendants Boyle and Owens argue that the government has taken one conspiracy and divided it into many different substantive offenses, thereby subjecting the defendants to multiplicitous prosecution for one transaction in violation of their Fifth Amendment right against being placed in double jeopardy.

The Courts have consistently held that it is legally proper to include in an indictment both a conspiracy count and substantive counts which are in part based on the allegations underlying the conspiracy charge. *See* Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1948); Carbo v. United States, 314 F.2d 718 (9th Cir. 1963), cert. denied, 377 U.S. 953, 84 S.Ct. 1625, 12 L.Ed.2d 498 (1964). It is also settled that a conspiracy charge is separate and distinct from the substantive offense, and therefore a plea of double jeopardy will not bar convictions on both charges. *See* Pinkerton v. United States, 328 U.S. 640, 643, 66 S.Ct. 1180, 90 L.Ed. 1489 (1948); Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954). Furthermore, the fact that the overt acts in the conspiracy count are the same acts charged in the substantive counts does not render the indictment deficient. See Pinkerton v. United States, *supra*, at 644, 66 S.Ct. 1180. As the Supreme Court stated in United States v. Bayer, 331 U.S. 532, 542, 67 S.Ct. 1394, 1399, 91 L.Ed. 1654 (1910):

> "The same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself."

Based on the foregoing decisions, this Court finds that the Indictment does not violate their right against being placed in double jeopardy.

Duplicity

Defendants Boyle and Owens contend that Count 1 of the Indictment should be dismissed, because they believe that this single count charges three distinct conspiracies, therefore making it duplicitous. An agreement to violate the law remains a single conspiracy although the agreement continues over a considerable period of time and contemplates numerous violations of the federal law. See Braverman v. United States, 317 U.S. 49, 63 S.Ct. 99, 87

L.Ed. 23 (1942). The Court realizes that where there is only one agreement to engage in criminal activity, the charging of a separate conspiracy for each criminal act would be prejudicial to the defendants, and the indictment itself would be subject to attack as multiplicitous. Braverman v. United States, *supra*. It must also be noted that separate conspiracies cannot be charged in a single count in the Indictment. *See* Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The Indictment in the case at bar charges a continuing conspiracy.

The defendants base their argument primarily on United States v. Goldberg, 206 F.Supp. 394 (E.D.Pa.), aff'd without consideration of the conspiracy count, 330 F.2d 30 (3d Cir. 1962), cert. denied, 377 U.S. 953, 84 S.Ct. 1630, 12 L.Ed. 2d 497 (1964) The Court has researched this case, and notes that the case has been rejected insofar as the conspiracy point is concerned by at least one judge on the United States District Court for the District of Columbia. In United States v. Baker, 262 F.Supp. 657, 684 (1966), aff'd without comment on this issue, 131 U.S.App.D.C. 7, 401 F.2d 958 (D.C.Cir.1968), 139 U.S.App.D.C. 126, 430 F.2d 499 (1970), cert. denied, 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384 (1971), Judge Oliver Gasch stated:

> "The defense memorandum also objects to the inclusion in Count 9 of conspiracy charges relating to the taxable years 1963 and 1964, arguing that a single count may embrace no more than the charge concerning a single year. A single conspiracy, however, to evade taxes for two or more years has been sustained. United States v. Haskell, 327 F.2d 281 (2d Cir. 1964), cert. denied, 377 U.S. 945, 84 S.Ct. 1351, 12 L.Ed.2d 307 (1964); Lott v. United States, 309 F.2d 115, 120 (5th Cir. 1962), cert. denied, 371 U.S. 950, 83 S.Ct. 504, 9 L.Ed. 2d 498 (1963), which appears to be contra to the case on which the defense relies, United States v. Goldberg, 206 F. Supp. 394 (D.C.E.D.Pa. 1962).

After carefully examining United States v. Haskell, *supra*, and Lott v. United States, *supra*, the Court finds that the Indictment alleges a continuing conspiracy, and therefore it is not duplicitous.

UNAUTHORIZED PERSONS IN GRAND JURY ROOM

The Court finds no merit in this unsupported allegation by defendant Boyle. Neither in the Memorandum of Points and Authorities in Support of the Motion to Dismiss nor at the hearing on the Motion was any evidence produced substantiating this claim. The Court realizes that the presence of an unauthorized person in the grand jury room raises a presumption of prejudice to the defendant. *See* Latham v. United States, 226 F. 420, 424 (5th Cir. 1915); United States v. Carper, 116 F.Supp. 817, 820 (D.D.C.1953). In considering a motion to dismiss the Indictment on this ground, the Court is not concerned with the possible guilt or innocence of the defendant, the seriousness of the charge, or even the possible effect of the court's decision on the case. *See* United States v. Carper, *supra*, 116 F.Supp. at 821. However, an objection on this ground must state facts, rather than mere conclusions. *See* United States v. Brumfield, 85 F. Supp. 696, 705 (D.C.La.1949). No specific facts have been alleged in the instant case; therefore, the Court denies dismissal on this ground.

DEFENDANT'S APPEARANCE BEFORE GRAND JURY

The law is clear that if the defendant is called by the grand jury, he is required to appear and to testify, although like any other witness he may claim his privilege with regard to any particular question that may be incriminating. *See* United States v. Irwin, 354 F.2d 192, 198-99 (2d Cir.), cert. denied, 383 U.S. 967, 86 S.Ct. 1272, 16 L.Ed.2d 308 (1965); United States v. Bachman, 164 F. Supp. 898 (D.D.C. 1958). In the case at bar defendant Owens was not a defendant at the time he appeared before the grand jury

as a witness. This is very similar to the circumstances in United States v. Wolfson, 294 F.Supp. 267 (D.C.Del. 1968). In that case the court held that even if the grand jury acquired incriminating evidence from a grand jury witness in violation of his Fifth Amendment right against self-incrimination, said witness, who later became a defendant, was at most entitled to suppress the evidence and its fruits if they were sought to be used at trial, but it would not bar prosecution altogether. *Id.* at 274-75. The cases are in conflict as to whether or not a potential defendant should be warned of his rights under the Fifth Amendment when he testifies before the grand jury. In at least one case in this circuit, the United States Court of Appeals for the District of Columbia found that this was a crucial stage in the criminal proceedings, and therefore a potential defendant should be warned of his rights. *See* Jones v. United States, 119 U.S. App.D.C. 284, 342 F.2d 863 (1964).

Defendant Owens has failed to substantiate his claim that his Fifth Amendment rights were violated by the fact that he was compelled to testify before the grand jury. The only evidence of any such violation is a mere allegation on the part of the defendant that his rights were infringed upon; therefore, the Court finds insufficient grounds to dismiss the indictment pursuant to this argument.

Statute Of Limitations

The defendants argue that the indictment, and each count thereof, is barred by the statute of limitations. However, they fail to indicate any case law in support of this contention. In United States v. Ewell, 383 U.S. 116, 122, 86 S.Ct. 773, 777, 15 L.Ed.2d 627 (1966), the Supreme Court stated that the statute of limitations "is usually considered the primary guarantee against bringing overly stale criminal charges." Where conspiracy charges are involved, the statute of limitations begins to run from the date of the last overt act. United States v. Johnson, 165 F.2d 42 (3d

Cir.), cert. denied, 322 U.S. 852, 68 S. Ct. 355, 92 L.Ed. 422 (1947). The indictment in the case at bar indicates that the last overt act occurred on or about June 10, 1969. The Court finds that the indictment was founded well within the five-year period of limitation provided by 18 U.S.C § 3282 (1970).

SPEEDY TRIAL

The defendants argue that they have been denied their constitutional right to a speedy trial under the Sixth Amendment and their constitutional rights to due process of law under the Fifth Amendment to the Constitution of the United States. Rule 48(b) of the Federal Rules of Criminal Procedure provides:

> "(b) *By Court.* If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

The United States Supreme Court in United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), has recently considered the problem presented by the defendants in their motion. First, the Court indicated that Rule 48(b) was limited to post-arrest situations. *Id.* at 463. The Court then stated:

> "Appellees do not claim that the Sixth Amendment was violated by the two-month delay between the return of the indictment and its dismissal. Instead, they claim that their rights to a speedy trial were violated by the period of approximately three years between the end of the criminal scheme charged and the return of the indictment; it is argued that this delay is so substantial and inherently prejudicial that the Sixth Amendment required the dismissal of the indictment. In our view, however, the Sixth Amend-

ment speedy trial provision has no application until the putative defendant in some way becomes an 'accused,' an event which occurred in this case only when the appellees were indicted on April 19, 1970.

The Sixth Amendment provides that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .' On its face, the protection of the amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch which is appropriate to assure him an early and proper disposition of the charges against him. '[T]he essential ingredient is orderly expedition and not mere speed.' Smith v. United States, 360 U.S. 1, 10, [79 S.Ct. 991, 3 L.Ed.2d 1041] (1959)." *Id.* at 459.

In the case at bar there have been two indictments returned within the past year. The indictment in Criminal No. 346-71 was returned March 2, 1971. The indictment in Criminal No. 1741-71 supersedes the indictment in Criminal No. 346-71, and it was returned on October 4, 1971. The Court does not believe that the defendants have demonstrated any prejudice which would require dismissal. The only delay in the case at bar to date was caused by the necessity of getting a transcript prepared from the motions hearings held during September, 1971, in order to argue the supplemental motions filed with respect to the new indictment. The Court believes that the case has been progressing in an orderly manner well within the standards discussed by the Supreme Court in the *Marion* case.

Lack Of New Evidence Before Grand Jury

Defendants Boyle and Owens have argued that the indictment in Criminal No. 1741-71 should be dismissed on the grounds that the indictment was obtained without re-examination of witnesses or documents supporting an earlier and substantially similar indictment in Criminal No. 346-71. The government states that the indictment in Criminal No. 1741-71 was presented to the same grand jury which returned the indictment in Criminal No. 346-71, without the presentation of new evidence or review of the evidence previously considered by the grand jury. The government read the later indictment in its entirety to the members of the grand jury before the new indictment was returned in Criminal No. 1741-71.

In Lawn v. United States, 355 U.S. 339, 349-50, 78 S.Ct. 311, 2L.Ed.2d 321 (1958), the United States Supreme Court displayed its refusal in the exercise of its supervisory power to allow defendants any latitude in examining either the adequacy or competency of evidence supporting criminal indictments. The Court stated:

> "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires no more." *Id.* at 349-50, 78 S.Ct. at 318, quoting, Costello v. United States, 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 397 (1956).

The preceding principle was applied by the United States Court of Appeals for the Fifth Circuit in United States v. James, 290 F.2d 866 (5th Cir.), cert. denied, 368 U.S. 834, 82 S.Ct. 60, 7 L.Ed. 2d 36 (1961), where the court stated:

> "The fact that the same Grand Jury after hearing evidence has previously returned an indictment purporting to charge the same offense does not deprive

the subsequent indictment returned without hearing additional evidence of the usual presumption of validity. The Grand Jury may use what it has legally heard before." *Id.* at 869.

It was pointed out by the government during the hearing on the defendants' Motion to Dismiss that the grand jury which returned the new indictment in Criminal No. 1741-71 was a special grand jury, and further that this grand jury had only heard evidence with respect to three cases since it returned the indictment in Criminal No. 346-71. The Court does not believe that another presentation of same evidence to members of the same grand jury which returned the indictment in Criminal No. 346-71 would have yielded any meaningful protection to the defendants. Such a presentation would have only served to delay the orderly administration of justice, which this Court feels would not be in the best interest of the defendants. Based on the foregoing, the Court concludes that dismissal of the indictment on these grounds should be denied.

FAILURE TO ALLEGE A VIOLATION OF 18 U.S.C. § 610 (1970)

The defendants argue that the indictment fails to allege a violation of or a crime under the provisions of 18 U.S.C. § 610 (1970), because that statute does not provide that it is unlawful for an officer of a labor organization to consent to any contribution prohibited by this section. The Court has carefully read that statute as a whole, and it has concluded that the defendants' argument is without merit. Furthermore, the Court disagrees with the defendants' contention that the United Mine Workers of America should be indicted and convicted as a condition precedent to the indictment and conviction of its officers. This Court is in no position to argue with the prosecutorial discretion of the Attorney General. *See also* this Court's Opinion in United States v. Boyle, 338 F. Supp. 1025 Criminal No. 346-71, decided September 27, 1971.

Having given full consideration to the arguments of counsel and the memoranda and points and authorities filed with respect to the Motion to Dismiss in both Criminal No. 1741-71 and Criminal No. 346-71, the Court concludes that the defendants' Motions to Dismiss be and the same hereby are denied.

[*Post-trial hearing on Motion for New Trial, June 27, 1972*]

The Court: How would you describe your motion to the court this morning, Mr. Cacheris?

Mr. Cacheris: Well, I think, Your Honor, technically, it would have to be a motion for a new trial, based on the fact that the Pipefitters case came down during the pendency of this case.

The Court: Very well. The court finds that the facts in the case of Pipefitters Local Union No. 502, et al., v. The United States, decided by the Supreme Court of the United States on June 22, 1972, are not the same or similar to those in the case at bar. Accordingly, the motion will be denied.

It is adjudged as to Count 13 that the defendant is hereby committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for a term of five years, and that the defendant become eligible for parole under Title 18, Section 4208(a)(2), at such time as the Board of Parole may determine, and that he is hereby fined the sum of $10,000 as to that count.

* * * * * * * * * *

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-143

W. A. BOYLE, *Petitioner*

v.

UNITED STATES

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 14, 1973

/s/ WARREN E. BURGER
Warren E. Burger
Chief Justice of the United States.

Dated this First day of August, 1973

APPENDIX D

(1) United States Constitution, Amendment I, provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

(2) United States Constitution, Amendment V, provides in pertinent part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

(3) United States Code, Title 18, Section 371, provides in pertinent part:

> If two or more persons conspire * * * to commit any offense against the United States, * * * in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(4) United States Code, Title 18, Section 610, at the time of the indictment provided in pertinent part:

> It is unlawful for * * * any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in * * * Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices. * * *
>
> [E]very * * * officer of any labor organization, who consents to any contribution or expenditure by the * * * labor organization * * * in violation of this sec-

tion, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(5) United States Code, Title 29, Section 501(c), provides in pertinent part:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

SUPREME COURT

FILED

OCT 29 1973

MICHAEL RODAK, JR., CLERK

No. 73-484

In the Supreme Court of the United States

OCTOBER TERM, 1973

W. A. BOYLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-484

W. A. BOYLE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. 610, as applied in this case to prohibit the expenditure of a union's general funds as political contributions to candidates in federal elections, violates the First Amendment; that the government should have been required to prove, and the jury to find, that the contributions in question were traceable to the involuntary sources from which the union's general treasury funds were predominantly derived; and that the district court erred in failing to instruct the jury that a union official cannot be convicted under 29 U.S.C. 501(c), prohibiting the transfer of union funds for an illegal purpose, without a finding either that there was no *bona fide* authorization by the union or that the union did not benefit from the transfer. He also argues that the convictions for

both the conspiracy and the substantive offenses violated the double jeopardy clause of the Fifth Amendment and constituted an improper application of the federal conspiracy statute.

After a jury trial in the United States District Court for the District of Columbia, petitioner, the former president of the United Mine Workers of America ("UMW"), was convicted of consenting to contributions of UMW funds to the campaigns of candidates for federal office, in violation of 18 U.S.C. 610 (Counts 2-12); of unlawfully converting union funds, in violation of 29 U.S.C. 501(c) (Count 13); and of conspiring to commit these offenses, in violation of 18 U.S.C. 371 (Count 1).[1]

On the two counts charging conspiracy and unlawful conversion, petitioner was sentenced to concurrent prison terms of five years, pursuant to the parole eligibility provisions of 18 U.S.C. 4208(a)(2); he was placed on probation for two years on the remaining eleven counts, pursuant to 18 U.S.C. 3651, the probationary period to commence after the expiration of the prison sentences. Petitioner was also ordered to pay cumulative fines totaling $130,000 and, as a condition to the partial suspension of sentence, was instructed to make restitution to the UMW treasury in the amount of $49,250. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

The thrust of the Government's evidence was that Labor's Non-Partisan League (the "League"), the lobbying arm of UMW, made contributions to candidates for federal office and various political commit-

[1] The conspiracy count alleged that there were four co-conspirators, two of whom were also indicted and were later acquitted.

tees. Virtually all of the League funds came directly from the general treasury of the Union. The contributions were directed by petitioner, in his dual capacity as president of UMW and chairman of the League, and carried out by two League members. The opinion of the court of appeals, on which we principally rely, sets forth in detail the facts of this case and, after thorough discussion, properly rejects the arguments which petitioner makes here. We add the following comments.

1. In arguing that 18 U.S.C. 610 violates the First Amendment because it prohibits the direct expenditure of union funds for contributions to candidates in federal elections (Pet. 8-15; see Pet. App. 12a-14a), petitioner relies not on any opinion of this Court, but upon the concurring opinion of Justice Rutledge in *United States* v. *C.I.O.*, 335 U.S. 106, 129, and the dissenting opinion of Justice Douglas in *United States* v. *Automobile Workers*, 352 U.S. 567, 593. The indictment in *C.I.O.* charged that the labor organization expended money for the publication of a weekly periodical, one issue of which urged members to vote for a certain candidate in an upcoming congressional election; the indictment in *Automobile Workers* charged that the union paid for television broadcasts in support of certain candidates for Congress. The minority opinions on which petitioner relies express reservations about the validity of Section 610 only when applied to such use of funds for direct forms of communication. *C.I.O., supra*, 335 U.S. at 130; *Automobile Workers, supra*, 352 U.S. at 598, n. 2. Moreover, by sustaining the indictment in *Automobile Workers*, this Court held that there are at least some situations in which the statute may be validly applied. As we discussed in our brief in *Pipefitters* v. *United States*,

407 U.S. 385 (No. 70-74, pp. 33-34), direct contributions from union general funds to political candidates are at the core of this statute and may be validly proscribed without violation of the First Amendment. Indeed, even the dissenting opinion in *Automobile Workers, supra,* 352 U.S. at 598, n. 2, recognized that contributions and expenditures may stand upon a different constitutional footing from other expressions of political opinion.

2. In regard to petitioner's assertion that the campaign contributions did not necessarily come from an "involuntary" source (Pet. 16-22; see Pet. App. 6a-12a), the court of appeals observed (Pet. App. 10a-11a) that the contributions to the League fund "were alleged to be a series of massive infusions from the UMW's general treasury, not a multitude of contributions from individual members, as in *Pipefitters,*"[2] and that the evidence raised no issue of the " 'voluntariness' of individual members' contributions to the UMW general treasury * * *." The court below thus quite correctly distinguished this case from *Pipefitters.* The court below also emphasized the impropriety of allowing the jury to find, with respect to the UMW's general fund, "that individual members

[2] In 1972, subsequent to the events involved in *Pipefitters, supra,* 18 U.S.C. 610 was amended to exclude expressly from the prohibited contributions or expenditures "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization." Pub. L. No. 92-225, Section 205, 86 Stat. 10.

authorized 'voluntary' political contributions of which they knew nothing * * *" (Pet. App. 11a).[3]

Contrary to petitioner's contention (Pet. 18-19, n. 10), the decision below does not conflict with *United States* v. *Warehouse Workers' Union,* 47 LRRM 2005 (E.D. Mo.). There the district court held—in accord with the rationale of the instant decision—that expenditures for political campaigns do not violate Section 610 when, as the record in that case proved, they are made from "funds voluntarily designated for such purpose by all or a part of the individual members of such labor organization," there is a *bona fide* accounting, and the amounts of the contributions do not exceed the voluntary funds. *Id.* at 2006-2007. Nor is petitioner's position supported by *United States* v. *Anchorage Central Labor Council,* 193 F. Supp. 504, 507 (D. Alaska), which involved the expenditure

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[3] Because a substantial part of the League's money had come from the Union's general treasury, where voluntary and involuntary funds were commingled, the court of appeals regarded it as immaterial that the government could not trace the source of a "small portion" of the League's treasury (Pet. App. 9a, n. 16). Petitioner contends that the unidentifiable portion of the League fund amounted to $60,000, which exceeded the total amount of the alleged contributions by $10,000 (Pet. 5). While the precise amount of this portion is not crucial to this case—as the opinion below makes clear (Pet. App. 9a, n. 16)—in fact only $2,600 (or .2% of the total deposits) could not be definitely identified as either a direct transfer from the Union or earnings on the amount transferred (Tr. 783-787; G. Exs. 3, 4). Petitioner also stated that the Union had over $90,000,000 in funds other than money from dues and assessments. As this Court repeatedly stated in *Pipefitters,* however, the general treasury of the Union is the prohibited source (407 U.S. at 416, 428, 438, n. 47, 439, n. 48); contributions from income made from the investment of dues and other fees are prohibited no less than contributions taken strictly from these mandatory payments. See 407 U.S. at 430.

of funds to pay for political telecasts by an asssociation to which labor unions had made voluntary contributions.[4]

3. In contesting the propriety of his conviction under 29 U.S.C. 501(c) for converting union funds (Pet. 22-25; see Pet. App. 14a-18a), petitioner argues—relying on *United States* v. *Silverman*, 430 F. 2d 106 (C.A. 2), certiorari denied, 402 U.S. 953—that a transfer violates that statute only if there was no subsequent authorization or if the union did not benefit from the transfer. However, as the court below noted (Pet. App. 15a), "[t]he *use* to which the money was converted in that case [*Silverman*], support of a candidate for state office, was not unlawful" (emphasis in original). Since the $5,000 contribution in this case violating Section 501(c) was also proscribed by Section 610, "[n]either authorization by any union officer or body, nor any re-

[4] Petitioner also relies on *United States* v. *Seafarers International Union*, 343 F. Supp. 779 (E.D. N.Y.), as demonstrating the government's obligation under Section 610 to document precisely the sources of a union's general fund (Pet. 18, n. 10). However, the dismissal of the indictment there was based not on the proposition that the government must always meet such a burden, but rather upon the government's failure to respond properly to a court order calling for a further bill of particulars and on the denial of the right to a speedy trial. In the course of the former ruling, the court noted, among other deficiencies in the government's case, that the prosecution had made a series of inconsistent statements during pretrial proceedings—including a representation, later contradicted, that it was not alleging contributions collected from union members or other persons required to pay dues. The court observed (343 F. Supp. at 782-783) that the government had failed to comply with orders to disclose information that it apparently was capable of producing. In the instant case, by contrast, a requirement that the government trace the sources of all Union funds would have been an "insuperable burden" (Pet. App. 9a) and was never ordered or required by the court.

sulting benefit to the union, would have rendered" that transfer lawful (Pet. App. 15a). See *United States* v. *Dibrizzi*, 393 F. 2d 642 (C.A. 2). By causing and consenting to that contribution in violation of Section 610, petitioner was subjecting the Union to a risk of criminal prosecution and a fine of $5,000. Such an act cannot reasonably be considered beneficial to the Union.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[5] Petitioner's claims of double jeopardy and improper application of the conspiracy statute (Pet. 25-28) are thoroughly answered by the opinion below (Pet. App. 18a-23a), upon which we rely.

DOJ-1973-10

SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1973

No. 73-484

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v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY TO "MEMORANDUM FOR THE UNITED STATES IN OPPOSITION"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-484

W. A. BOYLE, *Petitioner*

v.

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The Petition for a Writ of Certiorari in this case was filed on September 14, 1973, and thereafter the Government filed its "Memorandum of the United States in Opposition" in which it asks for a denial of the Petition. Petitioner believes that a few brief comments in reply to the Government's opposition are appropriate.

The Constitutionality of § 610

The most noteworthy feature of the Government's Memorandum is that it does not take issue with the primary reason urged by Petitioner to support its

argument for the grant of certiorari. That reason is that the case directly presents the important First Amendment question of the constitutionality of 18 U.S.C. § 610, a question which has been specifically reserved by this Court on at least three occasions (see Petition at 8-15). At no point does the Government question either that this case squarely presents that constitutional question, or that the question is unresolved and important.

In this connection, Petitioner would also bring to the Court's attention a recent article, "Of Politics, Pipefitters, and Section 610: Union Political Contributions in Modern Context," 51 *Texas L. Rev.* 936 (1973) (see especially pp. 942, 975, 986, 984, and 993). The article contains an exhaustive analysis of § 610 and the constitutional questions it raises, and concludes:

> In 1948 or 1957 the Supreme Court could have performed a valuable service by ruling on the constitutionality of the ban on union political contributions and expenditures. If the Court ever has another opportunity, it should not shrink from the challenge, as difficult of resolution as the issues may be. [*Id.* at 993.]

Petitioner submits that this case presents that opportunity, and the Government's Memorandum does not contend otherwise.

The Failure To Show an Involuntary Source

Turning to the question of the construction of § 610, the Government argues that the Court of Appeals properly construed and applied the statute (Memorandum at 4-6). Petitioner's position on this question

is set out in the Petition (at 16-22) and need not be repeated here. In its discussion, however, the Government makes one statement that is possibly misleading and another that is flatly inaccurate, and Petitioner believes the record should be made clear on both points.

As explained in the Petition, the Union's treasury, which was allegedly the source of the challenged campaign contributions, contained some *$90 million in funds other than involuntary dues and assessments.* The Government does not deny this fact. The Government does, however, assert in response that "income made from the investment of dues" is just as much a prohibited source for contributions as are the dues themselves (Memorandum at 5, n.3). Whatever the legal merit of this position,[1] it is highly misleading to make it here, because there was no evidence in this case that the $90 million consisted of "income made from the investment of dues." The record is clear—and the Government does not directly contend otherwise—that the $90 million included voluntary contributions to the Union, proceeds from the Union's sale of a booklet, and a variety of other sources that the Government failed to identify. In short, any implication in the Government's discussion notwithstanding, the $90 million in the Union's treasury from sources other than dues and assessments was not "income made from the investment of dues."

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[1] Petitioner vigorously disagrees that this statement is legally sound. To the contrary, Petitioner believes that the *Pipefitters* decision makes clear that only involuntary dues and assessments are a prohibited source and that any income the union may derive from its investment of those dues is a proper source for political contributions by the union. As explained in the text above, however, this question is not presented in this case.

The flatly inaccurate statement in the Government's Memorandum occurs in the same footnote discussed above (Memorandum at 5, n.3). This statement deals not with the question of the sources of the funds in the Union's treasury, but rather with the question of tracing the funds from the Union's treasury to the League, the organization that actually made the contributions. The Government contends that "only $2,600" of the League's funds was not "definitely identified" as either money transferred from the Union or earnings on amounts transferred. The fact, however, is that the Government's expert witness did not even examine the League's records prior to January 1, 1943, and the League had more than $30,000 in its bank account as of that date (J.A. 131-32). Thus, there was not even an attempt to identify the source of that amount. Second, an additional amount in excess of $28,000 was not shown to have been transferred from the Union, and the Government's witness did not testify that this amount was earnings on the amount transferred. Instead, the witness stated simply that "the majority" of this amount consisted of "advances to employees of the League, redemption of U.S. Savings Bonds, proceeds of sale of equipment, furniture, refunds and advances for football tickets and miscellaneous nature" (J.A. 134).

Issues Under 29 U.S.C. § 501(c) and 18 U.S.C. § 371

The Petition also raises issues with respect to the Court of Appeals construction of 29 U.S.C. § 501(c) particularly the conflict with the Second Circuit's *Silverman* decision, and with respect to application of the federal conspiracy statute, 18 U.S.C. § 371 (Petition 22-28). On both of these issues, the Government's Memorandum basically relies upon the conten-

tion that the Court of Appeals decision was correct (Memorandum at 6-7). Because the Memorandum thus raises no new issues, a reply is unnecessary other than to refer to the arguments on these issues as set out in the Petition (at 22-28).

Conclusion

In conclusion, Petitioner submits that the Government's Memorandum does not controvert the basic thrust of the Petition, namely, that this case presents substantial federal, constitutional and statuory issues of such importance as to justify this Court's consideration. Accordingly, Petitioner urges the Court to grant the Petition for a Writ of Certiorari to review the decision below of the United States Court of Appeals for the District of Columbia Circuit.

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